156-46

TRANSCRIPT OF RECORD

THE LAW ASSOCIATION OF PHILADELPHIA.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. ~~462~~. 151

WILLIAM STUART, PLAINTIFF IN ERROR,

vs.

THE CITY OF EASTON AND THE COUNTY OF NORTHAMPTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED MAY 4, 1891.

(14,622.)

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INDEX.

	Original.	Print.
Writ of error	1	1
Citation	2	1
Acceptance of service of citation	3	2
Caption	3½	2
Summons in ejectment	4	2
Marshal's return	5	3
Plea of the City of Easton	6	3
Plea of the County of Northampton	7	4
Order for jury	8	4
Jury and verdict	8	4
Motion and reasons for new trial	9	5
Judgment	10	5
Bill of exceptions	11	5
Plaintiff's evidence	12	6
Extracts from Dallas' Laws	12	6
Exhibits offered	13	7
Extracts from Dallas' Laws	14	7
Exhibits offered	15	7

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 15, 1893.

	Original.	Print.
Charge of the court	18	9
Exhibit No. 1—Act to enable certain persons to erect a court-house at Easton, &c.	19	10
2—Grant of lot in Easton for court-house	22	11
3—Plat and survey of lot	24	12
4—Patent of lot	25	13
5—Plaintiff's title	28	15
6—Agreement as to facts	41	21
7—Plat	43	22
8—Extract from Book of Proprietaries' Rights of Northampton Co.	44	22
9—Plan of City of Easton	45	22
10—Copy of page 101 of book designated "Proprietary Rights"	46	23
11—Copy of patent	47	23
12—Deed from Granville John Penn and Richard Penn to County of Northampton, September 24, 1852	50	25
13—Deed from Messrs. Penn to Peter Snyder *et al.*, June 3, 1802	54	27
14—Certificate of deputy secretary of internal affairs	59	30
Judge's certificate to bill of exceptions	60	31
Bond	61	31
Clerk's certificate	63	32

1 UNITED STATES, } *ss.:*
Eastern District of Pennsylvania, }

The President of the United States to the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, Greeting:

Because that in the record and process, and also in the rendering of judgment, in a suit before you, between William Stuart, a citizen of London, England, plaintiff, and The City of Easton & County of Northampton, corporations of the State of Pennsylvania, defendant-, in a plea of ejectment, a manifest error hath intervened, to the great damage of the said William Stuart, as in his complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that, if judgment thereof be given, then, under your seal, you do, distinctly and openly, send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the honorable the justices of the Supreme Court of the United States, sitting at Washington, D. C., on the second Monday of October next, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, this 30th day of December, A. D. one thousand eight hundred and ninety, and in the one hundred and fifteenth year of the Independence of the said United States.

Seal U. S. Circuit Court, E. D. Pennsylvania.

SAMUEL BELL,
Clerk of Circuit Court U. S.

2 THE UNITED STATES OF AMERICA, *ss:*

To the City of Easton and the County of Northampton, corporations of the State of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein William Stuart, a citizen of London, England, — plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 30th day of Dec., in the year of our Lord one thousand eight hundred and —.

WM. BUTLER, *Judge.*

3

JANUARY 3RD, 1891.

We hereby accept service of the within citation.

H. S. CAVANAUGH,
Sol'r for the Commissioner of Northampton County.
H. J. STEELE,
Solicitor for the City of Easton.

3½ In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

WILLIAM STUART, a Citizen of London, England,
vs.
THE CITY OF EASTON and THE COUNTY OF NORTHAMPTON, Corporations of the State of Pennsylvania. } No. 51. April Sess., 1888.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, }

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of April session, 1888. No. 51.

It is thus contained:

Be it remembered that on the 25th day of July, A. D. 1888, William Stuart, by his attorney, C. Berkeley Taylor, Esquire, comes into court here and sues forth therefrom a writ of summons in ejectment against the City of Easton and the County of Northampton, which, with the endorsement and return thereto, is in the words and figures following, to wit:

4 UNITED STATES,
Eastern District of Pennsylvania, } *set:*

The President of the United States to the marshal of the eastern district of Pennsylvania, Greeting:

We command you that you summon the City of Easton and the County of Northampton, corporations of the State of Pennsylvania, late of your district, if they may be found therein, so that they be and appear before the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, at a session of the same court to be holden at Philadelphia on the first Monday of August next, then and there to answer to a certain complaint made by William Stuart, a citizen of London, England, that the said defendants now have in their actual possession a lot of ground situate in the city, late town, of Easton and county of Northampton and State of Pennsylvania, in the centre of the great square of said town, containing eighty feet in length, north and south, and eighty feet in breadth, east and west, together with all ways, waters, water-courses, liberties, easements, privileges, profits, commodities, advantages, and appurtenances thereunto belonging (being at the intersection of Third and Northampton avenues, in said city), the

right of possession or title to which he, the said William Stuart, says is in him and not in the said The City of Easton or County of Northampton.

All which he, the said William Stuart, avers he is prepared to prove before our said court. Hereof fail not.

And have you then there this writ.

Witness the Honorable Samuel F. Miller, senior associate *chief* justice of the Supreme Court of the United States, at Philadelphia, this twenty-sixth day of July, A. D. 1888, and in the 113th year of the Independence of the United States.

SAMUEL BELL,
Clerk of Circuit Court U. S.

5 [Endorsed:] No. 51. Circuit court U. S., April sess., 1888. Stuart *vs.* The City of Easton, &c. Summons in ejectment. Returnable on the first Monday of August next. C. Berkeley Taylor, attorney for plaintiff.

JULY 27, 1888.

Served on the City of Easton and the County of Northampton by giving a true and attested copy of the within writ to Charles F. Chidsey, mayor of said city of Easton, and by giving a like copy to Richard Deemer and Edwin D. Shortz, two of the commissioners of said county of Northampton, and making known the contents thereof to each of them respectively.

——— ———.

James L. Marshall, being duly sworn according to law, deposes and says that he served the within writ in manner and form and at the time as set forth in the above return.

JAMES L. MARSHALL,
Dep. U. S. Marshal.

Sworn and subscribed this 6th day of August, A. D. 1888.

W. VON A. WILLIAMSON,
Pro Clerk C. C. U. S.

6 And thereupon, afterwards, to wit, on the 15th day of June, A. D. 1889, the defendant The City of Easton comes into court here and files its plea as follows, to wit:

United States C. Court, East. Dist. Pa., April Sess., 1888.

STUART *vs.* EASTON *et al.* } No. 51.

And now, to wit, June 13, 1889, The City of Easton, one of the above defendants, by Aaron Goldsmith, pleads "not guilty."

AARON GOLDSMITH,
Att'y for City.

To Samuel Bell, clerk U. S. C. C.

(Endorsed:) U. S. C. C., east. dist. Pa. 51. Ap'l, 1888. Stuart *vs.* City of Easton. Defendant's plea. Filed June 15, 1889.

7 And thereupon, afterwards, to wit, on the 15th day of March, A. D. 1889, the defendant The County of Northampton, by its attorney, H. S. Cavanaugh, Esq., comes into court here and files its plea as follows, to wit:

U. S. C. C., Eastern Dist. Penna., April Sess., 1888.

STUART *vs.* EASTON *et al.* } No. 51.

And now, to wit, March 14, 1889, The County of Northampton, one of the above defendants, by H. S. Cavanaugh, Esq., pleads not guilty.

H. S. CAVANAUGH,
Attorney for The County of Northampton.

To Samuel Bell, clerk C. C. U. S.

(Endorsed:) C. C. U. S., east. dist. of Pa. 51. Ap'l sess., '88. Stuart *vs.* Easton. Plea of Northampton Co. Filed March 15, 1889. Cavanaugh.

8 And thereupon it is ordered that a jury come to try the issue joined.

And afterwards, to wit, on the 9th day of October, A. D. 1889, came the parties aforesaid, and the jurors of the jury aforesaid, being called, likewise came, to wit:

1. James B. Beatty,
2. Henry C. Potter,
3. Aaron Fries,
4. William S. Grant,
5. William Fry,
6. Theodore C. Brown,
7. Henry A. Geisse,
8. John W. Schall,
9. Henry W. Broadhead,
10. Roswell G. Feltus,
11. Lewis C. Thompson,
12. Hugh J. Steen,

who are duly empanelled, returned, chosen, tried, and sworn or affirmed to speak the truth in the issue joined in this case.

And afterwards, to wit, on the 10th day of October, A. D. 1889, the jurors aforesaid, upon their oaths or affirmations aforesaid, respectively do say that they find for the defendants.

9 And thereupon, afterwards, to wit, on the 10th day of October, A. D. 1889, the plaintiff, by his attorney, C. Berkerley Taylor, Esq., moves the court for a new trial and files reasons in support thereof in the words and figures following, to wit:

U. S. C. C., East. Dist. Pa., April Sess., 1888.

STUART
vs. } No. 51.
EASTON *et al.*

And now, to wit, October 10th, 1889, the plaintiff, by C. Berkeley Taylor, Esq., his attorney, moves for a new trial in the above cause and assigns the following reasons:

1. Because the court took the case away from the jury.
2. Because the court directed a verdict for the defendant-.
3. Because the court did not direct a verdict for the plaintiff.
4. Because the verdict was against the law.
5. Because the verdict was against the evidence.

C. BERKELEY TAYLOR,
Attorney for Pl'ff.

10 (Endorsed:) U. S. C. C., east. dist. Pa. 51. Ap'l sess., 1888. Stuart *vs.* Easton. Motion and reasons for a new trial. Filed October 10, 1889. C. B. Taylor.

And thereupon, afterwards, to wit, on the 23d day of October, A. D. 1889, this cause coming on to be heard on motion for a new trial, and having been argued by the attorneys for the respective parties, and the court being fully advised in the premises, — order- and direct- that motion for a new trial be denied, and that judgment be entered on the verdict in favor of defendants and against the plaintiff.

Whereupon judgment is entered accordingly.

And afterwards, to wit, this 25th day of October, 1889, the plaintiff, by his attorney, files his bill of exceptions as follows, to wit:

11 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sess., 1888.

WILLIAM STUART, a Citizen of London, England,
vs. } No. 51.
THE CITY OF EASTON AND THE COUNTY OF NORTHAMPTON,
Corporations of the State of Pennsylvania.

Be it remembered that in the term of October, A. D. 1889, came the said plaintiff into the said court and impleaded the said defendants in a certain plea of assumpsit, &c., in which the said plaintiff declared (*pro ut narr.*) and the said defendant pleaded (*pro ut* pleas); and thereupon issue was joined between them.

And afterwards, to wit, at a session of said court held at the city of Philadelphia aforesaid, before the Honorable McKennan, president of the said court, on Wednesday and Thursday, the ninth and tenth days of October, A. D. 1889, the aforesaid issue between the said parties came to be tried by a jury of the said district for that purpose duly impannelled (*pro ut* list of jurors), at which day came

as well the said plaintiff as the said defendant, by their respective attorneys, and the jurors of the jury aforesaid impannelled to try the said issues, being also called, came, and were then and there, in due manner, chosen and sworn or affirmed to try the said issue, and upon the trial the counsel of the said plaintiff offered the following, to wit:

12 STUART
vs.
THE CITY OF EASTON *et al.* } 51. April, 1888. Otober 9, 1889.

Before Hon. William McKennan, judge, and a jury.

For plaintiff, C. B. Taylor; for defendants, H. J. Steele.

Plaintiff's Evidence.

Plaintiff's counsel offers in evidence from Dallas' Laws, first volume, an act of assembly of 1752, creating and erecting the county of Northampton at that time—that is, such sections of it as affect this case, as follows:

"Whereas, a great number of the inhabitants of the upper parts of the county of Bucks, by their petition, have humbly presented to the governer and assembly of this province, the great hardships they lay under by being so remote from the present seat of judicature and the public offices and the necessary means to be used for obtaining justice is attended with so much difficulty and expense, and many forego their right rather than attempt the recovery of it under such circumstances, while others sensible of their difficulties commit great violence with impunity. For remedying whereof and for the relief of the inhabitants, Be it enacted, that all and singular the lands lying within the province of Pennsylvania aforesaid be erected into a county, and the same is hereby erected into a county named and henceforth to be called Northampton, to be divided from the county of Bucks by the upper or northward line of Durham tract, to the upper corner thereof, then from a straight
13 line to be run southwestwardly to the line dividing the townships of Upper and Lower Milford, then along the said line to the line dividing Philadelphia and Bucks counties, and then by that line to the extremity of the said province."

Also the sixth clause, as follows: "And be it further enacted, that it shall and may be lawful/ to and for Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong and James Martin, or any three of them, to purchase and take assurance to them and their heirs, of a piece of land situated in some convenient place in the said town, in trust and for the use of the inhabitance of the said county, and thereon to erect a building, a court-house and prison sufficient to accom-*o*date the public service of the said county, and for the ease and convenience of the inhabitants."

Also copy of the act of 1763, not published, the copy being a certified copy from the land office, which is offered under an agreement in the case, Exhibit No. 1.

Also the warrent for the deeds of the court-house lot, Exhibit No. 2.

Also the survey which followed that warrent, Exhibit No. 3.

Also the patent to the trustees for this lot, Exhibit No. 4.

Also the pedigree that has been agreed to by counsel, with the agreement filed in this case to show that the present plaintiff is the proper plaintiff in the case as the representative of Thomas and Richard Penn, Exhibit No. 5.

Also an agreement entered into by counsel in this case as to certain of the facts, and in which the admissibility of these facts and their relevancy are still left to the court to determine, Exhibit No. 6.

14 Adjourned until 2 o'clock.

Afternoon session, called at 2 o'clock.

Plaintiff's counsel offers in evidence an act of assembly of 1780, Dallas' Laws, as to the vesting of the various court-house properties in the State of Pennsylvania—so much of it as reads as follows:

"And all and singular the court-houses, goals, prisons, and work-houses, together with the lots of land whereon they severally stand, or which are appeurtenant to them of, and in the several counties of this State, as they now are or heretofore have been vested in any feoffees or trustees, or in any bodies politic and corporate for the several use of the said counties respectively; and also other real estate to the good people of this Commonwealth, or of any county thereof, in their public and collective capacity belonging, or to their use or interest vested and conveyed, shall be, and hereby are, vested in the Commonwealth, freed and discharged, and absolutely acquit-ed, exempted and exonerated, of, from and against all claims and demands of the said feoffees or trustees, or bodies politic and corporate or of the survivors and survivor of such feoffees and trustees and every of them and of the heirs of such survivors and su-vivor forever: subject however to the several uses, intents, trusts, dispositions and direction, for which the same have been heretofore respectively appointed and limited, and to none others; saving and always reserving to every person and persons, bodies politic and corporate, his and their heirs, successors, other than the said feoffees and trustees, all such estates, right, title and interest, of, in, to and out of the premises vested in trust as aforesaid, as they, every or any of them, had before the passing of this act or could or might have had or enjoyed in case this act had not been made or passed."

15 Also section 9 of the act of the 15th day of April, 1834, as follows:

"The titles to all and singular the court-houses, jails, prisons and work-houses, together with the lots of land thereunto belonging or appertaining, in the several counties of this State, as they now are, or heretofore have been, vested in any feoffees or trustees, or in the Commonwealth, or in the commissioners of the respective counties, or in any bodies politic or corporate, for the several use of the said counties respectively, shall be, and they are hereby declared to

be, vested in the respective counties for the use of the people thereof, and for no other use."

Also the survey of 1,000 acres of land, with the allowance six per cent., surveyed October 8th, 1736, being a copy from the land office, marked No. 47, showing a survey of the tract of land upon which the town of Easton lay, this for the purpose of showing that the property on which the town of Easton lay was surveyed by the proprietaries and the survey filed in the land office prior to the divesting act, Exhibit No. 7, and an extract from the book of proprietary rights in the land office, showing that No. 47 was the 1,000 acres reserved by the proprietaries themselves, Exhibit No. 8.

Counsel for defendants object to the offer for the reason that the divestitory act reserved only to the proprietaries such lands as were surveyed and returned into the land office prior to July 4th, 1776, and the paper which is offered in evidence does not show that it was made in pursuance of any warrant for a survey issued by the proprietaries, nor does the paper show proper return to such warrant as having been made by an- authorized person whatever on behalf of the proprietaries.

16 Offer admitted in evidence. To which ruling counsel for defendant- excepts.

Also a properly certified plan of the town of Easton, being numbered 112, Exhibit No. 9.

Also a certificate from the book of proprietary rights, showing the page upon which No. 112 of the plan of Easton is entered, Exhibit No. 10.

Also certified copy of the deed refered to in the acts of 1752 and 1763 for the prison lot of land, showing the grant. Offered to show the grant of just such an estate as was granted in this case, to be followed by a subsequent grant and the reversion by Penn to the county, the two papers to be used as an estoppel upon the county from setting up that this is not an estate upon condition, Exhibit No. 11.

Defendants' counsel objects.

Offer excluded. To which ruling the plaintiff's counsel excepts.

Also the deed by Granville, John Penn, and Richard Penn to the county of Northampton, dated in 1852, for the reversion in the prison lot. Offered for two purposes—first, for the former purpose of establishing and using it, — with the jury to show an estoppel upon the county of Easton subsequent to the divesting act, to be followed by other deeds made by Penn subsequent to the divesting act. Exhibit No. 12.

Defendants' counsel objects to the offer as being incompetent and entirely irrelevant.

Offer excluded. To which ruling counsel for plaintiff excepts.

Also a deed by John Penn to Peter Schuyler *et al.* for a lot in the county of Easton subsequent to the divesting act.

17 Exhibit No. 13.

Defendants' counsel objects to the offer for the same reason.

Offer excluded. To which ruling plaintiff'd counsel excepts.

Also a certified copy from the books of the land office, showing that the records of the department of internal affairs of Pennsylvania show a number of warrants issued for lots in the town of Easton, Pa., and surveys made in pursuance thereof, and lots granted by the proprietaries of the province of Pennsylvania. Second, that no evidence can be found to indicate that any warrants were issued, any surveys made, or patents granted by the Commonwealth of Pennsylvania for any lots in the town of Easton, Pa. Exhibit No. 14.

Defendants' counsel objects to the offer.

Offer excluded. To which ruling plaintiff's counsel excepts.

Plaintiff rests.

Defendants' counsel asks the court to direct a verdict in favor of the defendant.

Adjourned until Thursday, Oct. 10th, 1889, at ten o'clock.

18 *Charge of Court.*

C. C. U. S.

STUART
vs.
THE CITY OF EASTON.

PHILA., THURS., *Oct.* 10, 1889.

MCKENNAN, *J.*:

GENTLEMEN OF THE JURY: This is an action brought to recover possession of a piece of land in the city of Easton, Pennsylvania, belonging originally to William and Richard Penn, and the plaintiff here claims as a descendant.

The land was conveyed many years ago to certain trustees named in deed for the erection of a court-house for public use and service in Northampton county, and for no other use, intent, or purpose.

The right of the plaintiff to recover here depends upon the effect of that deed, and the defendants now asks the court, in view of all of the evidence introduced by the plaintiff, to say that he has failed to make out his claim, and that he is not entitled to this property. It does seem to me that on the face of this deed to these trustees it was not for their own use and benefit, but for the use and benefit of the people of Northampton county in the erection and use of public buildings. It is therefore a trust, it seems to me, and the plaintiff has no interest in this question whatever.

If this land has been diverted to any other purpose than the one named in the deed, it does not affect his interest in any way, but affects only those for whose use the conveyance was made, and he has, therefore, no right to maintain any action of ejectment
19 for the recovery of this land on the ground that it was not conveyed irrevocably by the deed from the Penns.

I therefore instruct you that such is the effect of the conveyance, and the plaintiff is not entitled to maintain this action, and your verdict should, therefore, be for the defendant.

Counsel for plaintiff excepts to the binding instruction to the jury to find for the defendant, and the exception is thereupon noted.

Ex. No. 1.

[L. S.] JAMES HAMILTON.

An act to enable certain persons therein named to erect a court-house at Easton, in the country of Northampton, and to levy a tax on the inhabitants of the said country to defray the expense thereof.

Whereas by an act passed in the twenty-fifth year of the reign of the late King George the Second, entitled "An act for erecting the northwest part of Bucks into a separate county" it was enacted that Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong and James Martin, or any three of them should purchase and take assurance to them and their heirs of a piece of land situated in some convenient place of the town of Easton within the county of Northampton in trust and for the use of the inhabitants of the said county and thereon to erect and build a court-house and prison sufficient to accom-odate the public service of the said county and for the ease and convenience of the inhabitants, and that for the defraying the charges of purchasing the land building and erecting the court-house and prison aforesaid it should be lawful for the commissioners and assessors of the said county or a majority of them to assess and levy so much money as the said trustees or any three of them should judge necessary for purchasing the land and finishing the said court-house and prison, provided the sum of money so to be raised did not exceed three hundred pounds current money of this province.

And whereas the said trustees have already raised and expanded the sum of three hundred pounds and upwards in building a prison in the town of Easton in pursuance of the act hereinbefore mentioned and as no further provision is made by the said act for raising any further sums of money for the purpose aforesaid whereby the good purposes of the said act may be defeated,

For remedy whereof, Be it enacted by the Honorable James Hamilton, Esquire, lieutenant gove-nor under the Honorable Thomas Penn & Richard Penn, Esquires, true and absolute proprietaries of the province of Pennsylvania and counties of New Castle Kent and Sussex, upon the Delaware, by and with the advice of the representatives of the freemen of this province in General Assembly met and by the authority of the same, that it shall and may be lawful for the commissioners and assessors of the said county of Northampton or a majority of them, to assess and levy so much money of the said county as John Jones, Thomas Armstrong, James Martin, John Rinker and Henry Allshouse gentlemen, or any three of them, shall judge necessary for building a court-house and finishing the prison already erected, provided the sum so raised shall not exceed the sum of four hundred and fifty pounds current money of this

province, anything in this act or in the act hereinbefore mentioned to the contrary notwithstanding.

Signed by order of the house,

ISAAC NORRIS, *Speaker.*

Passed by the gove-nor the fourth day of March in the third
21 year of his majesty's reign *anno que Domini* one thousand seven hundred and sixty-three.

By his honour's com-and:

JOSEPH SHIPPEN, JR., *Secretary.*

OFFICE OF THE SECRETARY OF THE COMMONWEALTH,
HARRISBURG, *Sept.* 28*th*, *A. D.* 1889.

PENNSYLVANIA, *ss:*

I do hereby certify that the foregoing and annexed is a full, true, and correct copy of the original act of the General Assembly of the province of Pennsylvania, entitled "An act to enable certain persons therein named to erect a court-house at Easton, in the county of Northampton, and to levy a tax on the inhabitants of the said county to defray the expense thereof," as the same remains on file in this office.

In testimony whereof I have hereunto set my hand and caused the seal of the secretary's office to be affixed the day and year above written.

J. H.,
Deputy Secretary of the Commonwealth.

22 EXHIBIT 2.

PENNSYLVANIA, *ss:*

By the proprietaries.

Whereas in and by an act of General Assembly of this province intitled "An act of erecting the northwest part of Bucks into a separate county," which in and by the said act is called Northampton and Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong and James Martin, or any three of them were appointed trustees to purchase and take assurance to them and their heirs of a piece of land situate in some convenient place in the town of Easton in the said county, and thereon to erect and build a court-house and prison sufficient to accom-odate the public service of the said county, and for the ease and convenience of the inhabitants, as in and by the said act appears. And whereas on application and request of the said trustees, and out of our record to encourage and promote the improvement of the said town, and general good and convenience of the inhabitants of the said county, we have condecsended and agreed to grant to the said trustees a lot or a piece of ground of eighty feet square to be laid out in the centre of the great square in the middle of the said town of Easton, for a court-house for the use and the accom-odation of the inhabitants of the said town and county

forever: These are therefore to require you to survey and lay out or caused to be surveyed and laid out, a lot or piece of ground in the centre of the great square in the said town of Easton of the said dimensions of eighty feet square for the public use of a court-house for the inhabitants of the said town and county, and make return thereof into our secretary's office in order for confirmation to the said trustees and their heirs for the use aforesaid, and for your so doing this shall be your sufficient warrant: Given under my hand and the seal of the land office, by virtue of certain powers from the said proprietaries at Philadelphia the ninth day of July, 1762.

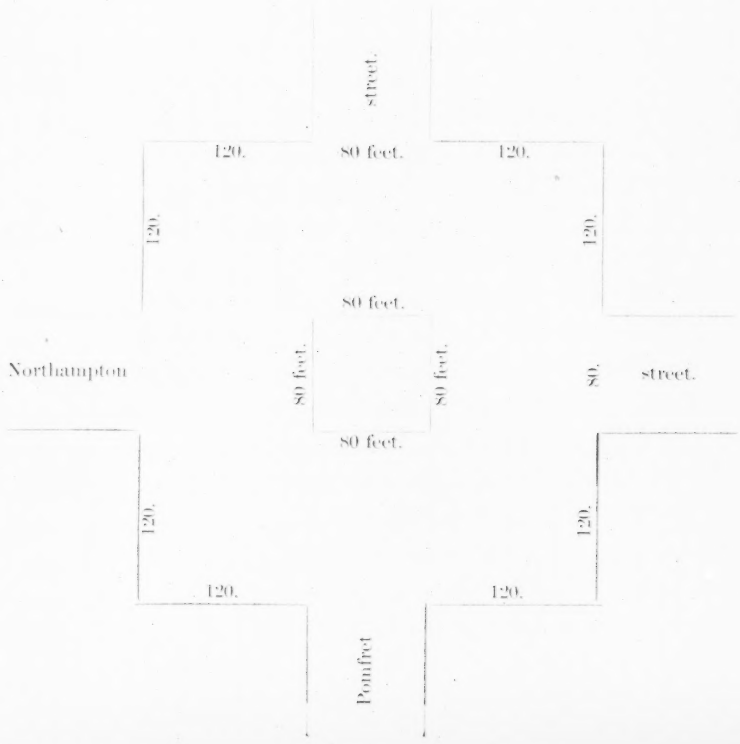
JAMES HAMILTON.

23 To John Lukens, surveyer general.

In testimony that the above is a copy of the original, remaining on file in the department of internal affairs of Pennsylvania, I have hereunto set my hand and caused the seal of the said department to be affixed, at Harrisburg, this twenty-seventh day of September, A. D. 1889.

[SEAL.] ISAAC B. BROWN,
Deputy Secretary of Internal Affairs.

24 Ex. No. 3.



In pursuance of a warrant dated the 9th day of July, 1762, surveyed the 8th of October, 1763, to Thomas Craig and others the above-described lot of ground, situate in the public square of the town of Easton, in the county of Northampton, containing in length, north & south, eighty feet and in breadth, east & west, eighty feet.

P. JAMES SCULL.

In testimony that the above is a copy of the original, remaining on file in the department of internal affairs of Pennsylvania, I have hereunto set my hand and caused the seal of the said department to be affixed, at Harrisburg, the first day of October, 1889.

[SEAL.] ISAAC B. BROWN,
Deputy Secretary of Internal Affairs.

25 EXHIBIT No. 4.

Thomas Penn and Richard Penn, Esquires, true and absolute proprietaries and governors-in-chief of the province of Pennsylvania and counties of Newcastle, Kent, and Sussex upon Delaware, to all unto whom these presents shall come greeting:

Whereas in and by an act of General Assembly of the said province passed in the twenty-fifth year of the reign of our late sovereign lord the Second entitled. An act for erecting the northwest part of Bucks into a separate county which in and by the said act is called Northampton and John Jones, Thomas Armstrong, James Martin, John Rinker and Henry Allshouse or any of them are appointed trustees to purchase and take assurance to them and their heirs of a piece of land situate in some convenient place in the town of Easton in the said county and thereon to erect and build a court-house and prison sufficient to accom-odate the public service of the said county as by the said act appears. And whereas in pursuance of a warrant dated the ninth day of July 1762 under the seal of our land office. We have at the special instance and request of the said trustees caused a lot of ground situate in the centre of the said town of Easton to be laid out for a court-house for the public use and service of the said county. (another lot of ground in the said town having been heretofore laid out for a prison or common *goal* erected thereon) which said lot in the centre square contains in length north and south eighty feet and in breadth east and west eighty feet as by the said warrant and survey of the said lot remaining in the surveyors general's office and from thence certified into, our secretary's office more fully appears. Now know ye that for the further encouragement and better promoting the public benefit and service of the said town and county and for and in consideration of the yearly
26 quit-rent hereinafter reserved and of the sum of five shillings to us in hand paid by the said trustees (the receipt whereof is hereby acknowledged) we have given granted released and confirmed and by the- presents do give grant release and confirm unto the said trustees John Jones, Thomas Armstrong, James Martin, John Rinker and Henry Allshouse and their heirs the said lot of

ground situate in the centre of the great square in the said town of Easton containing eighty feet in length north and south and eighty feet in breadth east & west together with all ways, waters, watercourses, liberties, easements, privileges, profits, commodities, advantages and appurtenances thereunto belonging and the reversions and remainders thereof to have and to hold the said hereinbeforedescribed lot of ground with the appurtenances unto the said John Jones, Thomas Armstrong, James Martin, John Rinker and Henry Allshouse their heirs and assigns forever. In trust nevertheless to and for the erecting thereon a court-house for the public use and service of the said county and to and for no other use intent or purpose whatsoever to be holden of us our heirs and successors proprietaries of Pennsylvania as of our manor of fermor in the county of Northampton aforesaid in free and common socage by fealty only in lieu of all other services, yielding and paying therefore yearly unto us our heirs and successors at the town of Easton aforesaid at or upon the first day of March in every year from the first day of March next one red rose for the same or value thereof in coin current according as the exchange shall then be between our said province and the city of London to such persons or person as shall from time to time be appointed to receive the same and in case of nonpayment thereof within ninety days next after the same shall become due that it shall and may be lawful for us our heirs and successors our and their receiver or receiversin to and upon the herebygranted lot of ground and premises to re-enter and the same to hold and possess until the said quit-rent and all arrears thereof together with the charges accruing by means of such non-payment and reentry be fully paid and discharged.

27 Witness John Penn Esquire lieutenant governor of the said province who by virtue of certain powers and authorities to him for this purpose *inter alia* granted by the said proprietaries hath hereunto set his hand and caused the great seal of the said province to be hereunto affixed at Philadelphia this twenty-eight- day of September, in the year of our Lord one thousand seven hundred and sixty-four. The fourth year of the reign of George the Third king over Great Britain &c. and the forty-seventh year of the said proprietaries' government.

JOHN PENN. [L. S.]

Recorded ye 17th Jan'y, 1765.

In testimony that the within is a copy of a patent as recorded in Patent Book A A, volume 6, page 115, remaining in the department of internal affairs of Pennsylvania, I have hereunto set my hand and caused the seal of said department to be affixed, at Harrisburg, this eighteenth day of February, A. D. 1888.

ISAAC B. BROWN,

[SEAL.] *Deputy Secretary of Internal Affairs.*

28

Ex. No. 5.

U. S. Circuit Court, Eastern Dist. of Penna.

WILLIAM STUART *vs.* THE CITY OF EASTON and THE COUNTY OF NORTHAMPTON.	April Sess., 1888. No. 51.

Plaintiff's Title.

1681. Charter, Charles II granting and confirming the province of Pennsylvania to William Penn & his heirs.
5 Sm. L., 406, &c.

NOTE. 1718, Aug. 30. William Penn died Aug. 30, 1718, leaving to survive him, by his wife, Hannah Callowhill, four children, John, Thomas, Margaret, and Richard. Hannah and Dennis had died in infancy.
(Gilpin's Pedigree.)

1712. May 27. Will — William Penn, wherein he devised (*inter alia*) all his lands in Penna. to his wife, Hannah Penn, *et al.*, in trust to appoint and convey all his residuary real estate in America to and among his children by his then wife in such proportions and for such estate as she should think fit.
Recorded at Philadelphia, Will Book No. 1, p. 238, &c.

29

1725, Jan. 7. Deed poll, whereby Hannah Penn, in pursuance and execution of above power, appointed the province of Pennsylvania, the testator's residuary estate, as follows:
To her son John Penn, $\frac{2}{4}$.
Thomas Penn, $\frac{1}{4}$.
Richard Penn, $\frac{1}{4}$.
Recorded at Philadelphia in Deed Book G. W. R. 31, page 40.

1735, June 24. Release, Samuel Preston and James Logan, surviving trustees under above will, to—
John Penn, $\frac{2}{4}$;
Thomas Penn, $\frac{1}{4}$;
Richard Penn, $\frac{1}{4}$ of, *inter alia*, their interest in said province.
Recorded at Philadelphia in Deed Book F 7, page 338, &c.

1732, May 8. Agreement between John Penn, Thomas Penn, and Richard Penn to devise their shares to the eldest son in tail, male, remainder to other sons in like manner, and if any die without issue, male, his share to go to the survivor or survivors and heirs as he should appoint, and if no appointment, then to survivors and their heirs, male.

Enrolled in chancery March 21, 1750.

In evidence in Penn *v.* Ld. Baltimore, 1 Vesey, Sr., 444; articles, wills, and deeds creating entail of Penna., 1, &c.; 10 Am. Law Register, N. S., 488.

30

NOTE. 1746, Oct. 29. John Penn, in whom was vested one-half of said province, died unmarried and without issue Oct. 29, 1746.

Gilpin Pedigree.

1746, Oct. 24. Will John Penn, wherein he devised his $\frac{3}{4}$ of Pennsylvania, etc, unto his brother Thomas Penn for life, with remainder to his first and other sons in tail, male, remainder to his brother Richard Penn for life; remainder to his first and other sons in tail, male; remainder to his brother Thomas Penn in tail, general, with authority to every tenant for life or in tail for the time being to grant any estate, however large.

Recorded at Philadelphia, Will Book H, page 295.

NOTE. Whereupon the said Thomas Penn became seized of $\frac{3}{4}$ of said province as above.

1750, Jan. 31. Agreement between Thomas Penn and Richard Penn, whereby, *inter alia*, they made the like power of sale in fee applicable to their respective fourths.

See 2 Yeates, 553–4.

Articles, wills, &c., creating entail of Penna., 37, &c.

10 Am. Law. Reg., N. S., 489.

1750, Mar. 20. Agreement between Thomas Penn and Richard Penn, wherein, *inter alia*, they agreed that each might by will, deed, settlement, or otherwise dispose of his $\frac{1}{4}$ to
31 all his own issue female in preference to all or any female issue of the other party.

2 Yeates, 553, 555.

Articles, &c., creating entail, 60, &c.

1771, Recited. Richard Penn intermarried with Hannah, daughter of Richard Lardner, M. D., and died in the year 1771, leaving to survive him 2 sons, John and Richard, and one daughter, Hannah. His third son, William, died in his lifetime unmarried and without issue.

2 Yeates, 556.

1750, 21 March. Will of Richard Penn, wherein he devised his ¼ of Pennsylvania, &c., unto his son John Penn for life, remainder to his first and other sons in tail, male; remainder to his son Richard for life; remainder to his first and other sons in tail, male; remainder to his son William for life; remainder to his first and other sons in tail, male; remainder to his brother Thomas for life; remainder to his first and other sons in tail, male; remainder to his sons successively, in tail, general; remainder to his daughter in tail, male, and in tail, general, successively; remainder to his brother Thomas in tail, general.

Duly recorded in prerogative office, at Burlington, in Book XV of Wills, folio 357.

Articles, &c., creating entail, 66.

10 Am. Law Reg., N. S., 489, &c.

32 As to ¼ of province belonging to Richard, the elder.

1795 John Penn married Annie Allen and died without issue in 1795.

Will duly proved at Phila. Feb. 18, 1795.

Recorded in Will Book X, 197, &c.

2 Yeates, 575.

NOTE. Hannah Penn intermarried with James Clayton and died without issue.

Gilpin's Pedigree.

2 Yeates, 556.

NOTE. Whereupon said ¼ vested in Richard Penn, the younger.

NOTE. 1811. Richard Penn intermarried with Mary Masters and died in the year 1811, leaving issue four children—Hannah, William, Richard, and Mary.

Adm'r Book L. p. 244, at Phila.

NOTE. Hannah Penn died unmarried and without issue.

Coleman's Pedigree.

Gilpin's Pedigree.

Articles by Jno. Jay Smith, delivered before the Hist. Soc. of Phila.

NOTE. 1862. Mary Penn intermarried with Samuel Paynter and died without issue in 1862.

See above pedigrees.

NOTE. 1846. William Penn intermarried with Juliana Catharine, and died in 1846, unmarried and without issue.

33 Gilpin's Pedigree.

NOTE. 1863, Apr. 27. Richard Penn died April 27, 1863, without issue.

Letters of administration taken out in Philadelphia Nov. 13, 1863.

See Adm'r Book L, 105, *c. t. a.*

NOTE. Whereupon the ¼ interest in the province vested in the descendants, in tail general, of Richard Penn, the elder, became vested in the descendants of Thomas Penn, and from this time on the whole interest of John, Thomas, and Richard Penn became vested in the descendants of Thomas Penn.

As to the various interests in the province vested in the descendants of Thomas Penn.

NOTE. Thomas Penn intermarried with Lady Juliana Farmor.
1751.

1751, Aug. 15. Marriage settlement between Thomas Penn and Lady Juliana Farmor, wherein he conveyed his fourth of said province to his own use for life; remainder to his first and other sons in tail, male, successively; remainder to his brother Richard for life; remainder to his first and other sons in tail, male, successively; remainder to the heirs of the body of him, the said grantor, with power of sale in the holder of the title.

Acknowledged in Phila. July 11, 1829.

Recorded July 22, 1829, in Deed Book G. W. R. No. 31, page 53, &c.

34

NOTE. 1775, Mar. 21. Thomas Penn died March 21, 1775, leaving to survive him Juliana Penn, John Penn, Granville Penn, and Sophia Margaret Penn. He had four other children who died minors, namely, William Penn, Louisa Penn, Thomas Penn, and William Penn (two of the same name).

Gilpin's Pedigree.

1771, Nov. 18. Will of Thomas Penn, wherein he did devise, *inter alia*, as follows: "My late brother's moiety of the province of Pennsylvania and of the three lower counties of Newcastle, Kent, and Sussex, upon Delaware, in America, being already settled in and by his last will and testament, and my own quarter part of the same province and the three lower counties being by me settled in consideration of a marriage which was then intended and which hath been since had between me and my said dear wife, Lady Juliana, and some provision being already made in some cases for my widow and some of my children in and by certain family deeds of agreement entered into and executed by and between my late brothers and myself, or by and between some of us, I do hereby give, bequeath, devise, and dispose of all the other parts of my real estate, etc."

Proved at Philadelphia April 6, 1829, and recorded in Will Book 2, p. 154, &c.

NOTE. Juliana Penn intermarried with William Baker and died leaving to survive her one daughter, Juliana Baker, who intermarried with J. F. Rawlings and died without issue.

35 Gilpin's Pedigree.
10 Am. Law Reg., N. S., p. 491.

1834, June 21. John Penn, called John Penn of Stoke Pogis, died June 21, 1834, without issue.
See Will Book No. 11, p. 667, &c., at Phila. for his will.
Gilpin's Pedigree.

1844, Sept. 28. Granville Penn intermarried with Isabella, daughter of General Forbes, and died September 28, 1844, leaving to survive him three sons, Granville John Penn, Thomas Gordon Penn, and William Penn. He had by his wife nine children, six of whom, however, died before him, to wit, Juliana Margaret, who died a minor, unmarried and without issue, in 1804; Sophia, who intermarried with William Gomm and died without issue in 1827; Louisa Emily, who died, unmarried and without issue, in May, 1842, and Isabella Mary, Henrietta Ann, and John William, all of whom died minors, unmarried and without issue.
Gilpin's Pedigree.
Will of Granville Penn, recorded at Phila. in Will Book No. 29, p. 384, &c.

Children of Granville Penn entitled to his $\frac{3}{4}$ interest.

NOTE. 1848, Jan. 4. William Penn, son of Granville Penn, died, unmarried and without issue, January 4, 1848.
Gilpin's Pedigree.

36

NOTE. 1867, Mar. 29. Granville John Penn, son of Granville Penn, died, unmarried and without issue, March 29, 1867. He paid the last visit of the Penns to Penna. in June, 1852.
Will recorded at Philadelphia in Will Book 63, page 234, &c. Letters of administration upon his estate recorded in Adm'r Book T, page 173, &c.
Gilpin's Pedigree.

NOTE. 1869, Sep. 10. Thomas Gordon Penn, son of Granville Penn, died, unmarried and without issue, September 10, 1869, and with him terminated the estate tail, male, created under the agreements and wills of John, Thomas, and Richard Penn, sons of William Penn and proprietaries of Penna.

NOTE. Whereupon the said province or interest therein vested in descendants of Thomas Penn in tail general.

1847, Apr. Sophia Margaret Penn, daughter of Thomas Penn, intermarried with William Stuart, archbishop of Armagh, and died in April, 1847, leaving to survive her four children, William, Mary Juliana, Henry, and Louisa.

NOTE. Gilpin's Pedigree.
10 Am. Law Reg., N. S., 491.

NOTE. 1823. Louisa Stuart, daughter of Sophia Margaret Penn, died, unmarried and without issue, in the year 1823.
Gilpin's Pedigree.

37

NOTE. 1854, Oct. 26. Henry Stuart, son of Sophia Margaret Penn, died, unmarried and without issue, October 26, 1854.
Gilpin's Pedigree.

NOTE. 1866, July 11. Mary Juliana Stuart, daughter of Sophia Margaret Penn, intermarried with Thomas, Viscount Northland, now the earl of Ranfurly, and died July 11, 1866, leaving to survive her nine children.
Gilpin's Pedigree.

NOTE. Upon the death of Thomas Gorden Penn, in 1869, the remainder in tail general of the estate of the Penns in Pennsylvania vested in William Stuart, oldest son of Sophia Margaret Penn, daughter of Thomas Penn. The various private estates in land of Pennsylvania also vested in the said William Stuart under act April 27, 1855, representation being only allowed as far as children of uncles and aunts, and Mary Juliana had died in 1866, before the remainder was cast.
See opinion, Wharton & Rawle to Penns, June 1, 1875; also act 1855.

1870, Aug. 5. Deed, William Stuart, heir in tail of John Penn, the elder, John Penn, the younger, Thomas Penn, and Richard Penn to Levi Bull in fee for all and singular the lands, tenements, and hereditaments in the State of Pennsylvania whereof the said party is or of right ought to be seized as tenant in tail, in trust to reconvey the same to the party of the first part in absolute fee simple.

38 Acknowledged before the United States consul general at London Aug. 5, 1870.

Entered on records of court of common pleas, Phila. county, and presented in the court September 24, 1870; recorded in Book 29, page 322.

Entered at Pittsburg as above Oct. 17, 1870, Book K, pages 2, 3, 4, & 5.

Recorded at Philadelphia, Deed Book J. A. H. 98, page 309, &c.

1870, Sep. 2. Deed, Levi Bull to William Stuart in fee, in pursuance of the purpose of barring the entail in Penna.

Acknowledged same day. Recorded Dec 22, 1870, in Deed Book J. A. H. No. 98, page 311, &c.

Note. 1874, July 7. William Stuart intermarried with Henrietta, daughter of Admiral Sir Charles Pole, and died July 7, 1874, leaving to survive him several children, the oldest named William.

1854, Sept. 4, Will — William Stuart, wherein he devised as follows: "I give, devise, and bequeath all my real estate over which I have any power of disposition and all my personal estate and effects whatsoever and wheresoever to my eldest son, William Stuart, his heirs, executors, administrators, and assigns, absolutely." Duly proved at London, September 26, 1874, and recorded in Philadelphia December 28, 1876, in Will Book No. 88, page 367, &c.

39 The plaintiff in the present suit is the above-mentioned William Stuart, of London, England, and has vested in him all rights of the proprietaries of Penna., both under the entail and the will of his father, who barred it.

It is agreed between counsel in above cause that the facts set forth in plaintiff's title are true, the legal effect to be determined by the court, plaintiff to produce copies, if required, of all papers (not certified) referred to in said title.

(Signed) H. S. CAVANAUGH,
Attorney for Comm's of Northampton County.

(Signed) AARON GOLDSMITH,
Att'y for City.

(Signed) C. B. TAYLOR,
Att'y for Pl'ff.

3, 2, '89.

(Here follows genealogical chart marked p. 40.)

41 U. S. C. C., East. Dist. of Pa.

STUART *vs.* EASTON. } Ap'l Sess., 1888. No. 51.

EXHIBIT No. 6.

And now, to wit, October 7th, 1889, it is agreed by and between counsel in the above cause that the following facts are true, the admis-*a*bility as evidence and the legal effect thereof to be determined by the court, to wit:

1. That the property the subject of the above suit is of greater value than $5,000.

2. That the Northampton county court-house was erected upon said property between the years 1763 and 1766, and remained upon the lot from that time until 1862, in which year it was removed, and no other buildings have been erected thereon since.

3. That upon July 25th, 1888, at 11 o'cl'k a. m., in the presence of H. S. Cavanaugh, attorney for the county commissioners of Northampton county; C. N. Andrews; Aaron Goldsmith, city solicitor of the city of Easton; Chas. F. Chidsey, mayor of said city, and Geo. D. Morrell, C. B. Taylor, attorney for the present plaintiff, entered upon the above property and took possession of the said lot
42 for the plaintiff as heir and successor to Thomas and Richard Penn, former proprietaries of Pennsylvania, for the breach of the condition under which the lot had been granted by patent from them, dated Sept. 28th, 1763; recorded July 17, 1765, in Patent Book A A, vol. 6, p. 115, and to revest the land in him as of the original estate of said patentors, and that thereupon the representatives of the County of Northampton and the City of Easton, the def'ts here, jointly ousted the said C. B. Taylor.

4. That the letter books of the Penns at the Historical Society in Phila., containing letters and instructions to commissioners and surveyors as to laying out the town of Easton, be admitted.

C. B. TAYLOR,
Att'y for Pl'ff.
H. J. STEELE,
Solicitor for City of Easton.
H. S. CAVAN.

41 EXHIBIT No. 8.

Among the records and proceedings of the department of internal affairs of Pennsylvania, *inter alia*, it is thus contained.

* * * * * * * *

47. (Hon'ble Tho. Penn, d'f't of 1,000 a. & 500 a. in the forks of Delaw'e, in the handwriting of Benjamin Eastburn; also another tract & not mentioned.)

* * * * * * * *

In testimony that the above is an extract from the Book of Proprietaries' Rights of Northampton County, recorded on page No. 91, remaining on file in the department of internal affairs of Pennsylvania, I have hereunto set my hand and caused the seal of said department to be affixed, at Harrisburg, this twenty-seventh day of September, A. D. 1889.

[SEAL.]

ISAAC B. BROWN,
Deputy Secretary of Internal Affairs.

(Here follows diagram marked p. 45.)

46 Ex. 10.

No. 102. Proprietaries' 535 a. draft on Del. R. below the foul rife.
103. Joseph Owen, mem'r. of a lease agreed to be given him of 500 a. of land at Shehocking.
104. Henry Roan, Jun'r, 80 a. 72 p's d'f't, part of an approp'd tract of the Hon'ble Thos. Penn, Esqr.
105. Henry Kramer, 91 a. 15 p. d'f't, part of ditto.
106. Conard Fox, 110, 132 d'f't, part of ditto.
107. Sebastian Unangst, 83 a. 153 p's d'f't, p't ditte.
108. Ditto, 79½ a. d'f't, do.
109. John Devalt, 84 a. 27 — d'f't, do.
110. Jno. Anderson, 67 a. 95 p. d'f't, part of props.; dry land, No. 193, in Scull's gen'l d'f't.
111. Lewis Gordon, Esqr., 210 a. 107 p's, part of ditto, No. 194.
112. Plan of Easton.
113. Ditto.
114. Ditto.

In testimon- that the above is a copy of page (101) one hundred and one of a book designated as "Proprietary Rights," remaining on file in the department of internal affairs of Pennsylvania, I have hereunto set my hand and caused the seal of said department to be affixed, at Harrisburg, this fifth day of October, A. D. 1889.

[SEAL.] THOS. J. STEWART,
Secretary of Internal Affairs.

47 Ex. No. 11.

Thomas Penn & Richard Penn, Esquires, true and absolute proprietaries and governors-in-chief of the province of Pennsylvania and counties of Newcastle, Kent, & Sussex, on Delaware, to all unto whom these presents shall come, Greeting:

Whereas in and by an act of General Assembly of this province intitled An act for erecting the northwest part of Bucks into a separate county which in and by the said act is called Northampton Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong and James Martin or any three of them were appointed trustees to purchase and take assurance to them and their heirs of a piece of land situate in some convenient place in the town of Easton in the said county in trust and for the use of the inhabitants of the said county and thereon to erect and build a court-house and prison sufficient to accom-odate the public service of the said county and for the ease and convenience of the inhabitants as in and by the said act appears. And whereas on the application and request of the said trustees and out of our regard to encourage and promote the improvement of the said town and general good and convenience of the inhabitants of the said county we have condescended and agreed to grant unto the said trustees a lot or piece of ground (No. 96) in

the said town for a prison of the dimensions of two hundred and forty feet in length by sixty in breadth bounded northward by a twenty-feet alley eastward by another twenty-feet alley southward by lot number ninety-eight and westward with Pomfret street. And whereas we did issue our warrant bearing date the ninth day of July last under the seal of our land office requiring our surveyor governor to make return of the said lot into our secretary's office in order for confirmation to the said trustees for the public use aforesaid which hath been accordingly done as by the said warrant & survey remaining in
48 the surveyor general's office and from thence certified into our secretary's office more fully appears. Now know ye that for and in consideration of the sum of five shillings to our use paid by said trustees (the receipt whereof is hereby acknowledged) and of the yearly quitrent hereinafter mentioned and reserved we have given granted released and confirmed and by these presents for us our heirs and successors do give grant release and confirm unto them the said Thomas Craig, Hugh Wilson, John Jones Thomas Armstrong, and James Martin their heirs and assigns the said lot or piece of ground as the same is hereinbefore mentioned with all ways waters watercourses, easements improvements and all other rights liberties privileges advantages hereditaments and appurtenances whatsoever thereunto belonging or in anywise appertaining. To have and to hold the said lot or piece of ground and premises thereby granted with the appurtenances unto the said Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong and James Martin and their heirs and assigns. To the only use and behoof of them the said Thomas Craig, Hugh Wilson, John Jones Thomas Armstrong and James Martin their heirs and assigns forever. In trust and for the use of the inhabitants of the said county and *and* thereon to erect a common goal or prison sufficient to accomodate the public service of the said county and to and for no other use whatsoever. To be holden of us our heirs and successors proprietaries of Pennsylvania as of our manor of Fernot in the county of Northampton aforesaid in free and common soccage by fealty only in lieu of all other services. Yielding and paying therefor yearly unto us our heirs and successors at the town of Easton in the said county at or upon the first day of March in every year from the first day of March last—
49 One red rose to such person or persons as shall from time to time be appointed to receive the same. Witness James Hamilton, Esquire lieutenant governor of the said province who by virtue of certain powers & authorities to him for this purpose (*inter alios*) granted by said proprietaries hath hereunto set his hand and caused the great seal of the said province to be hereunto affixed at Philadelphia this eighteenth day of January in the year of our Lord one thousand seven hundred and sixty-three. The third year

Ensed with pencil

of the reign of King George the Third over Great Britain &c. And the forty-fifth year of the [illegible] government.

JAMES HAMILTON. [L. S.]

Recorded ye 10th Feb[illegible]

In testimony that the [illegible] a copy of a patent as recorded in Patent Book "A A" [illegible] No. 220, remaining in the department of internal affairs of Pennsylvania, I have hereunto set my hand and caused the seal of said department to be affixed, at Harrisburg, this second day of October A. D. 1889.

[SEAL.] ISAAC B. BROWN,
Deputy of Internal Affairs.

50 Ex. No. 12

Deed.

Granville John Penn & Richard Penn
to
County of Northampton

This indenture made the twenty-fourth day of September in the year of our Lord one thousand eight hundred and fifty-two between Granville John Penn of Stoke-park in the parish of Stoke Pogos in the county of Bucks in England esquire by his attorney George Cadwallader of the city of Philadelphia esquire by letter of attorney duly constituted which letter of attorney is dated the eighteenth day of September in the year of our Lord one thousand eight hundred and forty-six and recorded at Easton in the county of Northampton in letter of attorney Book No. — page — and Richard Penn (3) of Whitehall in the city of Westminster in England esquire by his attorney Benjamin Eusby of the city of Philadelphia esquire by letter of attorney duly constituted which letter of attorney is dated the twelfth day of December in the year of our Lord one thousand eight hundred and fifty and recorded Easton aforesaid in letter of attorney Book No. — page — of the one part and the county of Northampton on the [illegible] Commonwealth of Pennsylvania of the other part. Whereas Thomas Penn and Richard Penn late proprietaries and governors-in-chief of the province of Pennsylvania by James Hamilton lieutenant governor of the said province by them duly constituted for that purpose did by patent under the great seal dated the eighteenth day of January in the year of our Lord one thousand seven hundred and sixty-three and recorded in the [illegible] of Philadelphia in Patent Book A. A. vol. 4 page 220 &c. grant and convey unto Thomas Craig, Hugh [illegible] and Wilson John Jones Thomas Armstrong and James Mar[illegible] trustees appointed by act of assembly to purchase and take assurance to them and their heirs of a piece of land situate in some convenient — in the town of Easton in the county of Northampton aforesaid and thereon to erect and build a court-house and prison sufficient to accomodate the public service of the said county a lot or piece of ground [illegible] in the said town for a

prison of the dimensions of [illegible] hundred and forty feet in length by sixty feet in breadth bounded northward by a twenty-feet-wide alley eastward by another twenty-feet-wide alley southward by lot No. 98, and westward with Pound Street in trust and for the use of the inhabitants of the said county and thereon to erect a common gaol or prison sufficient to accommodate the public service of the county and to and for no other use whatsoever. And whereas the said county of Northampton is desirous of becoming the owners of the said lot of ground with the appurtenances in fee simple to be by them occupied and enjoyed for the said purpose whatsoever they may deem proper and at pleasure to sell and convey the same free and clear from all and every restriction incumbrance and estate whatsoever. Now this indenture witnesseth that the said Granville John Penn and Richard Penn, in whom the reversionary estate in the said lot of ground by force and in virtue of divers devises and conveyances in the law duly had and executed is now vested for and in consideration of the sum of five hundred dollars to them in hand paid by the said the county of Northampton the receipt whereof is hereby acknowledged and the said county of Northampton forever thereof — and discharged by these presents have granted bargained sold enfeoffed released and confirmed and by these presents do grant bargain sell enfeoff release and
52 confirm unto the said the county of Northampton their successors and assigns all right title interest estate property claim and demand whatsoever which they the said Granville John Penn and Richard Penn or either of them their or either of their heirs executors or administrators have or might have in or to or out of the said described lot or piece of ground with the appurtenances to have and to hold the same unto the said county of Northampton their successors and assigns to and for the only proper use benefit and behoof of the said county of Northampton their successors and assigns forever.

In witness whereof the said parties to these presents have hereunto interchangeably set their hands and seals the [illegible] day and year first above written.

GRANVILLE JOHN PENN [seal]
By his attorney, GEO. CADWALLADER [seal]
RICHARD PENN [seal]
By his attorney, BENJ. RUSH [seal]

Sealed and delivered in the presence of—
JOHN THOMPSON
DAVID F. FOLEY

Received on the day of the date of the above-written indenture of and from the above-named the county of Northampton the sum of five hundred dollars in full of the consideration before mentioned.

GEO. CADWALLADER,
Attorney for Granville John Penn.
BENJ. RUSH,
Attorney for Richard Penn.

On the 25th day of September, A. D. 1852, before me, the subscriber, an alderman in and for the city of Philadelphia, personally appeared George Cadwallader, in the foregoing indenture named, and in due form of law acknowledged the same to be his own
53 act and deed as well as the act and deed of his constituent, the said Granville John Penn, and desired the same to be taken and recorded as such according to law.

Witness my hand and seal.

JOHN THOMPSON, *Ald.* [SEAL.]

On the 25th day of September, A. D. 1852, before me, the subscriber, an alderman in and for the city of Philadelphia, personally appeared Benjamin Rush, in the foregoing indenture named, and in due form of law acknowledged the same to be his act and deed, as well as the act and deed of his said constituent, the said Richard Penn, and desired the same might be taken and recorded as such according to law.

Witness my hand and seal.

JOHN THOMPSON, *Ald.* [SEAL.]

COMMONWEALTH OF PENNSYLVANIA, }
County of Northampton, } *ss.*

I, George R. Hess, recorder of deeds, &c., in and for said county aforesaid, do hereby certify that the above and foregoing is a true and correct copy of the deed recorded in Deed Book T, vol. 8, page 226, &c., as full and entire as the same remains of record in my said office.

In testimony whereof I have hereunto set my hand and affixed the seal of my said office, at Easton, this second day of October, A. D. 1889.

[SEAL.] GEORGE R. HESS, *Recorder.*
PERSAM. S. YOHE, *Deputy.*

54 Ex. No. 13.

Deed.

Messrs. Penn }
to }
Peter Schuyder *et al.* }

This indenture made the twenty-third day of June in the year of our Lord one thousand eight hundred and two between the Honorable John Penn of Stoke Poges in the county of Bucks in the Kingdom of Great Britain esquire one of the late proprietaries of Pennsylvania and of the three lower counties of Newcastle Kent and Sussex now the Delaware State and the Honorable Richard Penn of Queen Ann street west in the parish of St. Marylebone in the county of Middlesex in the Kingdom of Great Britain aforesaid esquire brother of the late John Penn who was the other of the late proprietaries of Pennsylvania and of the three lower counties now

the State of Delaware aforesaid by John R. Coates of the city of Philadelphia in the State of Pennsylvania esquire their attorney duly constituted and authorized by letter of attorney under the hands and seals of the said John Penn and Richard Penn legally executed bearing date 27th day of November 1800 intended to be recorded of the one part and Peter Snyder, Nicholas Droxell and Nicholas Kern of the town of Easton trustees for the German Reformed congregation in and near the town of Easton aforesaid and Jacob Weygandt William Roup and Conard Bettenbender of the said town of Easton trustees of the German Lutheran congregation in and near the town of Easton aforesaid of the other part.

Witnesseth that the said John Penn and Richard Penn by their said attorney for and in consideration of the sum — ten dollars lawful money of the United States unto the said Jacob R. Coates for the use of his said constituents by the said parties of the
55 second part well and truly paid at the execution hereof the receipt whereof is hereby acknowledged have granted bargained and sold aliened released and confirmed and by these presents grant bargain and sell release and confirm unto the said Peter Schnyder Nicholas Droxell and Nicholas Kern Jacob Waygandt William Roup and Conrad Bittenbender and to their heirs and assigns three certain lots or pieces of ground situate in the town of Easton in the borough of Easton in the county of Northampton one of them situate on the east side of Pomfret street being the two contiguous lots named in the general plan of the said town No. 70 and 72 containing in breadth together one hundred and ten feet and in length or depth two hundred and forty feet bounded southward by a twenty-feet-wide alley eastward by another twenty-feet-wide alley northward by lot 68 and westward by Pomfret street aforesaid (on which lots the said congregation have erected a church and schoolhouse) Another of them situate on the east side of Ferry street being the two contiguous lots marked in the general plan of the said town of Easton No. 179 and No. 180 containing in breadth together on the said Ferry street one hundred and ten feet and in length or depth two hundred and twenty feet bounded eastward by lot No. 178 southward by a twenty-feet-wide alley westward by Hamilton street and northward by Ferry street aforesaid and the other of them situate on the east side of John street containing in breadth east and west three hundred and fourteen feet and in length or depth north and south two hundred and seventy-five feet bounded eastward by Julianna street southwardly by a twenty-feet-wide alley and westward by John street aforesaid together with all and singular the ways waters water-courses rights liberties and privileges hereditaments and appurtenances whatsoever thereunto belonging or in anywise appertaining and the reversions and remainders rents due-
and profits thereof and all the estate right title and interest
56 property claim and demand whatsoever of them the said John Penn and Richard Penn respectively in law equity or otherwise howsoever of in and to the same To have and to hold all and singular the premises hereby granted with the appurtenances unto the said Peter Snyder Nicholas Droxell Nicholas Kern Jacob

Weygandt William Roup and Conrad Bittenbender their — and assigns forever in trust nevertheless as for and concerning the first above described lot of ground as a site for the church or house of religious worship and school-house erected thereon and such other buildings as may be deemed necessary for the convenieney of the said congregation and as for and concerning the two last above described lots of ground as burial places for the use of the German Reformed and German Lutheran congregations in and near the town of Easton aforesaid and in confidence that the said Peter Snyder Nicholas Droxell Nicholas Kern Jacob Weygandt William Roup Conrad Bittenbender and the survivors and the survivor of them their and his heirs and assigns do and shall permit and suffer all and singular the premises hereby granted and every part thereof and the building thereon erected to be at all times forever at the disposal and under the care regulation and management of the trustees elders and church wardens of the said religious societies for the time being or a majority of them *of them* and to and for no other use or purpose whatsoever and the said John Penn and Richard Penn for themselves their heirs executors and administrators respectively do by their said attorney covenant promise and agree to and with Peter Schnyder Nicholas Droxell Nicholas Kern Jacob Weygandt William Roup and Conrad Bittenbender their heirs and assigns by these presents that they the said John Penn and Richard Penn and their heirs respectively all and singular the premises hereby granted with the appurtenances unto the said Peter Schnyder Nicholas Droxell Nicholas Kern Jacob Weygandt William
57 Roup and Conrad Bittenbender their heirs and assigns by these presents that they the said John Penn and Richard Penn and their heirs respectively all and singular the premises hereby granted with the appurtenances unto the said Peter Schnyder Nicholas Droxell Nicholas Kern Jacob Weygandt William Roup and Conrad Bittenbender their heirs and assigns in trust for the uses aforesaid against them the said John Penn and Richard Penn and their heirs respectively and against all and every other person or persons whatsoever lawfully claiming or to claim by from or under them or any or either of them shall and will warrent and forever defend by these presents In witness the said parties have hereunto interchangeably set their hands and seals Dated the day and year first above written.

JOHN PENN. [SEAL.]
RICHARD PENN. [SEAL.]
By their attorney, JOHN R. COATES. [SEAL.]

Sealed and delivered in the presence of us—

FRED. BEATES.
PHILIP T. DUNN.

Received, the day of the date of the above-written indenture, of the above-named Peter Schnyder, Nicholas Droxell, Nicholas Kern, Jacob Weygandt, William Roup, and Conrad Bittenbender the sum

of ten dollars, being the full consideration money above mentioned, for the Honorable John Penn and Richard Penn, Esq'r.

JOHN R. COATES.

Witness:
FRED'K BEATES.

The twenty-third day of June, A. D. 1802, before me, the subscriber, mayor of the city of Philadelphia, came the above-named John R. Coates and in his own name and in the name of his constituents, the above-named John Penn and Richard Penn, in due form of law acknowledged the above-written indenture to be his own act and deed of his said constituents by him, the said John
R. Coates, done and executed by virtue of a letter of
58 attorney to him for that purpose granted, and desired the same might be recorded as such.

Witness my hand and seal the day and year aforesaid.

MAT. LAWLER, *Mayor.* [SEAL.]

Recorded the 20th Sept., 1802.

COMMONWEALTH OF PENNSYLVANIA, }
County of Northampton, } *ss:*

I, George Hess, recorder of deeds, &c., in and for said county, do hereby certify that the above and foregoing is a true and correct copy of the deed recorded in Deed Book G, vol. 2, page 102, &c., so full and entire as the same remains of record in my said office.

In testimony whereof I have hereunto set my hand and affixed the seal of my said office, at Easton, this 2nd day of October, A. D. 1889.

[SEAL.]

GEORGE R. HESS, *Recorder.*
Per SAM. S. YOHE, *Deputy.*

59 Ex. No. 14.

This is to certify—

First. That the records of the department of internal affairs of Pennsylvania show that a number of warrants were issued for lots in the town of Easton, Pennsylvania; that the surveys were made in pursuance thereof, and that the patents were granted for said lots by the proprietaries of the province of Pennsylvania.

Second. That a thorough search has been made among the records of the department, but no evidence can be found to indicate that any warrants were issued, any surveys made, or any patents granted by the Commonwealth of Pennsylvania for any lots in the town of Easton, Pennsylvania.

In witness whereof I have hereunto set my hand and caused the seal of said department to be affixed, at Harrisburg, this third day of October, A. D. 1889.

[SEAL.]

ISAAC B. BROWN,
Deputy Secretary of Internal Affairs.

60 And thereupon the counsel for the said plaintiff did then and there except to the aforesaid charge and opinion of the said court; and inasmuch as the said charge and opinion so excepted to do not appear upon the record—

The said counsel for the said plaintiff did then and there tender this bill of exceptions to the opinion of the said court and requested the seal of the judge aforesaid should be put to the same according to the form of the statute in such case made and provided.

And thereupon the aforesaid judge, at the request of the said counsel for the plaintiff, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 25th day of October, A. D. 1889.

W. McKENNAN, [SEAL.]
Cir. Judge.

60½ [Endorsed:] U. S. C. C., E. D. Pa. 51. April sess., 1888. Stuart *v.* Easton. Bill of exceptions. Presented Oct. 18, 1889. Wm. McKennan, cir. J. C. P. Taylor, att'y for pl'ff.

61 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

WILLIAM STUART, a Citizen of London, England, *vs.* THE CITY OF EASTON and THE COUNTY OF NORTHAMPTON, Corporations of the State of Pennsylvania.	April Sess., 1888. No. 51.

Know all men by these presents that we, William Stuart, Francis F. Eastlack, Jr., and the "The Land Title and Trust Company," are held and firmly bound unto The City of Easton and The County of Northampton in the full and just sum of five hundred dollars, to be paid to the said The City of Easton and The County of Northampton, their certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighth day of December, A. D. 1890.

Whereas lately, at a term of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a suit depending in said court between William Stuart, a citizen of London, England, *vs.* The City of Easton and The County of Northampton, corporations of the State of Pennsylvania, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid
62 suit, and a citation directed to the said defendants, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next ensuing:

Now, the condition of the above obligation is such that if the said William Stuart shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM STUART. [SEAL.]
FRANCIS F. EASTLACK, JR. [SEAL.]
THE LAND TITLE AND TRUST CO.
NATH. E. JANNEY, *Prest.* [SEAL.]

Attest: ALBERT OUTERBRIDGE.
Trust Officer.

Sealed and delivered by the above-named William Stuart in presence of—

P. A. HAWORTH,
14 *Bedford Row, London, Solicitor.*
FRANCIS W. TRIGART,
U. S. Deputy Consul General.
WM. BROOKE RAWLE.
As to F. F. E., Jr.

Approved.
WM. BUTLER, *Judge.*

[Endorsed:] No. 51. April sess., 1888. Circuit court United States. William Stuart, a citizen of London, England, *vs.* The City of Easton and The County of Northampton, corporations of Pennsylvania. Bond surwrit of error. Filed December 30, 1890.

63 UNITED STATES OF AMERICA, }
Eastern District of Pennsylvania, } *set:*

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of William Stuart *vs.* The City of Easton and The County of Northampton, No. 51, April sess., 1888, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 17th day of January, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and fifteenth.

Seal U. S. Circuit Court, E. D. Pennsylvania

SAMUEL BELL,
Clerk of C. C.

Endorsed on cover: Case No. 14,622. E. Pennsylvania C. C. U. S. No. 462. William Stuart, plaintiff in error, *vs.* The City of Easton and The County of Northampton. Filed May 4, 1891.

151 15-6-46

Office Supreme Court U. S.
FILED.
OCT 24 1894
JAMES H. McKENNEY,
CLERK.

No. 462. October Term, 1893.

Supreme Court of the United States.

156-46

William Stuart, Plaintiff in Error,

vs.

City of Easton and County of Northampton, Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

INDEX.

	PAGE
Statement of the Case	1
Assignments of Error	3
Argument	5

C. BERKELEY TAYLOR,
A. T. FREEDLEY
W. BROOKE RAWLE,
For Plaintiff in Error.

Allen, Lane & Scott, Prs., Phila.

(14,622)

SUPREME COURT OF THE UNITED STATES.

William Stuart, Plaintiff in Error (Plaintiff below),

vs.

The City of Easton and the County of Northampton, Defendants in Error (Defendants below).

October Term, 1893.

No. 462.

BRIEF FOR PLAINTIFF IN ERROR.

HISTORY OF THE CASE.

This was an action of ejectment. It was brought by the heir at law of the Penns, the former proprietaries of Pennsylvania. The question turns upon the construction of the grant of 28th September, 1764. (Record, page 13, Exhibit No. 4.)

By an Act of General Assembly of the Province of Pennsylvania, passed March 11th, 1752, the upper portion of Bucks County was erected into a separate county called Northampton.

At that date counties were not possessed of full corporate powers, and hence the Act named John Jones and others as trustees of said county, with power under section 6 to acquire a lot in some convenient place in the town of Easton in said county for the purposes of a court-house and prison.

On July 9th, 1762, Thomas and Richard Penn, the proprietaries of Pennsylvania, issued a warrant to John Jones and others, the above-named trustees, for a lot eighty feet square in the centre of the great square at Easton.

Subsequently a survey of said lot was returned into the land office, and on September 28th, 1764, a patent was issued by said proprietaries to John Jones and others for said lot.

The grant was for a nominal consideration of five shillings and the reservation of an annual rent of a red rose.

The premises of the patent, after reciting the Act of Assembly, proceed, "Now know ye, that for the further encouragement and better promoting the public benefit and service of the said town and county, and for and in consideration of the yearly quit rent (one red rose) hereinafter reserved and of the sum of five shillings * * * we have given, granted, released, and confirmed, &c., unto the said trustees, John Jones, &c., and their heirs, the said lot." (Describing it.)

The *habendum* of the patent was as follows:—

"To HAVE AND TO HOLD the said hereinbefore described lot of ground with the appurtenances unto the said John Jones, Thomas Armstrong, James Martin, John Rinker, and Henry Allshouse, their heirs and assigns forever, in trust, nevertheless, to and for the erecting thereon a court-house for the public use and service of the said county, *and to and for no other use, intent, or purpose whatsoever.*" (See Exhibit No. 4, printed copy of Record, page 13, for said deed in full.)

By the subsequent Act of Assembly of 15th April, 1834, P. L., 538, the title of the trustees became vested in the county of Northampton.

Between the years 1763 and 1766 a court-house was erected on the lot, which was used by the county until 1862, when it was torn down and the place where it stood has since been used as an open square by the city of Easton. The court-house has been erected elsewhere and the lot in question definitely abandoned as a court-house site.

On July 25th, 1888, William Stuart, who was the heir at law of Thomas and Richard Penn, as appears by sundry wills and descents (Exhibit No. 5, page 15 of the printed Record), caused an entry to be made on the said land for breach of the condition in the above patent, and subsequently brought this action of ejectment to recover possession of the same. The court, McKennan, J., directed a verdict

for defendant upon the ground that the grant of 1764 conveyed an unconditional and absolute fee simple, and thereafter the grantors and their heirs had no rights in the land.

Upon the trial plaintiff offered in evidence certified copies of a survey of one thousand acres, embracing, *inter alia*, the premises in dispute, returned into the land office of Pennsylvania October 8th, 1736, No. 47, for the plat upon which the town of Easton lay, and of an extract from the book of proprietary rights in the land office, showing that said tract was reserved by the proprietaries themselves (Exhibit Nos. 7 and 8, printed Record, page 22); these were admitted by the court. Plaintiff also offered a series of deeds by the proprietaries both before and after the divesting Act of 1779, and a certificate from the land office that the Commonwealth had not granted any land within the lines of this survey; and also offered other conveyances between the Penns, as proprietaries of Northampton County, whereby the latter recognized the conditional estate of the plaintiff's ancestors reserved in similar conveyances. These were offered for the purpose of showing a contemporaneous course of construction and conduct on the part of the proprietaries and the Commonwealth and Northampton County, recognizing the ownership by the proprietaries of this tract. These deeds and this certificate were rejected by the court and form the subject of exceptions.

ASSIGNMENTS OF ERROR.

First.—The learned court below erred in instructing the jury to find a verdict for the defendant.

Second.—The learned court below erred in not instructing the jury that the effect of the patent of 28th September, 1764, was to create a conditional estate in the grantees therein and those claiming under them.

Third.—The learned court below erred in refusing to admit in evidence Plaintiff's Exhibit No. 11 (printed Record, page 23), being deed Thomas Penn and Richard Penn, proprietaries of Pennsylvania, to Thomas Craig *et al.*, for the prison lot in

the town of Easton, dated 18th January, 1763, recorded February 10th, 1763, in Patent-book AA, No. 4, page 220, &c.

Fourth.—The learned court below erred in refusing to admit in evidence Plaintiff's Exhibit No. 12 (printed Record, page 25), being deed Granville John Penn and Richard Penn, proprietaries of Pennsylvania, to county of Northampton, for the conditional estate of the said proprietaries in the prison lot in the town of Easton, dated 24th September, 1852, recorded at Easton, in Deed-book F, vol. VIII., page 226, &c.

Fifth.—The learned court below erred in refusing to admit in evidence Plaintiff's Exhibit No. 13 (printed Record, page 27), being deed John Penn and Richard Penn, proprietaries of Pennsylvania, to Peter Snyder *et al.*, for lots Nos. 70 and 72, 179 and 180, in the town of Easton, dated June 23d, 1802, recorded at Easton 20th September, 1802, in Deed-book G, vol. II., page 402, &c.

Sixth.—The learned court below erred in refusing to admit in evidence Plaintiff's Exhibit No. 14 (printed Record, page 30), being a certificate from the land office in Pennsylvania showing that no warrants, surveys, or patents had been issued by the Commonwealth of Pennsylvania for lotsin the town of Easton, Pa.

ARGUMENT.

The first two assignments of error raise the main question in the case, which is, whether the grant of September 28th, 1764, made by the proprietaries of Pennsylvania to John Jones and others in trust for the erecting a court-house for the public use of Northampton, *and for no other use, intent, or purpose whatsoever* (see Exhibit No. 4 of the Transcript of Record, page 13, for the deed in full), created a conditional estate or an unrestricted fee simple.

The conveyance by the proprietaries was upon a nominal consideration. They were willing to give their land for use as a court-house, but not for any other purpose. They therefore expressly imposed that condition in their grant, and by the plainest language. They conveyed an estate by a grant which was to be commensurate in duration with the purpose to be answered by it. The grantees accepted the gift under and subject to the condition imposed. They held it upon that tenure. They have now definitely and irretrievably abandoned the purpose for which the lot was granted. Yet, notwithstanding, they seek to retain the gift, and, in opposition to the plain language of the grant, to claim that no restriction upon their rights exists; they claim an unfettered estate with full power of perversion to any use, intent, or purpose they desire, and with full power of alienation; and while claiming the benefit of the grant to them, attempt to reject the conditions upon which that grant was made. They seek the benefit of the gift without its burdens. They invoke the aid of one part of the conveyance, viz., the premises, and they seek to reject another part thereof, viz., the *habendum*.

But, as was said by this court in Cowell *vs.* Springs Co., 100 U. S., 57, where an ejectment for a breach of a condition was sustained: "The answer is, that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. * * * The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been upheld.

In this way slaughter-houses, soap factories, distilleries, livery stables, tanneries, and machine shops have, in a multitude of instances, been excluded from particular localities, which, thus freed from unpleasant sights, noxious vapors, or disturbing noises, have become desirable as places for residences of families. To hold that conditions for their exclusion from premises conveyed are inoperative would defeat numerous arrangements in our large cities for the health and comfort of whole neighborhoods."

And, as was further said by this court (100 U. S., page 61): "The grantee took his title from the company with a condition. * * * And he is therefore estopped, when sued by the grantor for the premises, upon breach of the condition, from denying the corporate existence of the plaintiff or the validity of the title conveyed by its deed. Upon obvious principles he cannot be permitted to retain the property which he received upon condition that it should be restored to his grantor on a certain contingency, by denying, when the contingency has happened, that his grantor ever had any right to it."

It is submitted:—

I. A conveyance for a specified purpose and for "no other use, intent or purpose whatsoever" creates an estate upon condition, and upon breach of the condition the grantor is entitled to recover.

II. This rule of construction applies equally whether the conveyance is or is not to trustees.

I.

A conveyance for a specified purpose and "for no other use, intent or purpose whatsoever" creates an estate upon condition, and upon breach of the condition the grantor is entitled to recover.

Grants similar to the present, to wit, for a particular purpose and "for no other use or purpose," have always been held in Pennsylvania and elsewhere to create conditional estates.

In *Kirk* vs. *King*, *3 Penna. St. Rep.*, *436*, a lot was granted

to the employers of the school at Plumb Creek, to have and to hold said lot for an English school-house *and no other purpose* to them who now are or may hereafter be the employers of said school forever. In 1815 a school-house was built upon said lot; in 1836 it was abandoned and so continued until 1843, when the grantor entered for condition broken. Plaintiffs brought trespass. The court below took the same view that the court below in the present case did, but upon appeal the Supreme Court reversed, saying, per Gibson, C. J.:—

"McElroy's conveyance to the employers of the school at Plumb Creek, being an unincorporated association, was void at law for want of a grantee capable of taking, and the legal title remained in the grantor, subject to the uses declared in the deed. * * * Second, the nature of their right depends on the terms of the agreement, which was to use the ground 'for an English school-house *and for no other purpose.*' And that was the substantial consideration of the grant, the nominal consideration of fifty cents being expressed under some vague apprehension that it might be essential to the raising of a use; and *the grant itself was consequently on an implied condition or agreement that the school should be kept up.* The grantor certainly did not agree to part with his land without receiving the benefit promised in return for it. We must hold it to be commensurate in duration with the purpose to be answered by it; and the question is, was the school permanently abandoned. At the time of the defendant's entry it had been discontinued for the space of seven years, without any indication on the part of the employers of an intention to so use it, and this was certainly enough to raise a legal presumption of its abandonment. * * * It is not found that they require the ground for the use of a school, or that they intend to use it as such. The abandonment of the trust for seven years being irretrievable, the defendant, as the grantor's successor, had a right to enter and hold against all the world."

There is great similarity between that case and the present one.

1. The object of the deed was a school, as the object here was a court-house.

2. There was but a nominal consideration, as here.

3. A trust was created, for though there the fee did not pass yet the court held the grantor was seized to the use or in trust for the school, as the trustees were here.

4. The court held the grantor seized of a trust upon condition that the school be kept up, as the trustees here hold upon condition that the court-house be kept upon it.

5. The court held that the abandonment for seven years was irretrievable, and entitled the grantor's successor to re-enter and hold against the world.

This case in so far as it decided that a public school was not a charity has been dissented from, but in so far as it ruled the point for which it is here cited it has always been followed.

In *Sheetz* vs. *Fitzwater*, 5 Pa. St. Rep., 126, a grant was made of a mill dam, and also one perch of land on each side of said dam or pond, to and for the use and service of a certain mill, *and for no other use whatsoever*. The mill-pond being subsequently drained and farmed, the grantee of the original grantor entered for condition broken, and trespass was brought against him. *Held*, he was entitled to re-enter.

Krause, P. J., in the court below, said: "Emlen did not convey a fee simple estate in that land; he conveyed a qualified fee, determinable on the abandonment of Lardner, his heirs or assigns, of the use and service for which the conveyance was made, as stated in the deed. And in conveying such limited fee he retained the reversion in himself, and that he could permit to descend or sell to others. To convey such limited fee and to retain the reversion was his intention, as the court collects it from his deed."

Among the errors assigned upon appeal was the construction of Emlen's deed. This was affirmed by the Supreme Court, who, in reversing upon another point not connected with this, said: "There is only one assignment of error in

this record which is sustained, and the other points are left to stand on the reasons of the judge, which seem to be satisfactory."

See the question of the base fee discussed in the arguments of counsel.

These cases were decided in 1846 and 1847. They have been consistently followed in Pennsylvania. Thus, in *Methodist Church* vs. *Public Ground Co., 103 Pa. St. Rep., 613* (decided in 1883), the Supreme Court, in construing the agreement in that case, held, that as said covenant and agreement only referred to a certain use of the land "without other words," such covenant or agreement did not create an additional estate, but that if the words "and for no other purpose" had been superadded, the result would have been different. Thus the court said:—

"Did the writing create a conditional estate? It contained none of the technical terms usually employed for that purpose, neither '*sub-conditione, proviso*,' nor '*ita quod*.' It is true no one of these is essentially necessary to constitute a condition; other words clearly equivalent thereto are sufficient. Hence an estate conveyed for '*an* English schoolhouse *and no other purpose*' was held in Kirk *vs.* King, 3 Pa. St. Rep., 436, to revert to the grantors after the school therein had been discontinued for seven years, so long as to create a presumption of permanent abandonment. So in Scheetz *vs.* Fitzwater, 5 *Id.*, 126, a conveyance of a mill-dam or pond of water and mill-race, and a perch of land on each side thereof, for the use and service of a certain mill, with the land thereunto belonging, '*and for no other use whatsoever*,' the title was held to be a base fee, determinable on disuse as a pond."

Accord, McKissick *vs.* Pickle, 16 Pa. St., 140;
Watters *vs.* Bredin, 70 *Id.*, 237.

The same doctrine was again affirmed in Pennsylvania, in
Slegel *vs.* Lauer, 148 Penna. St. Rep., 236,
decided in 1892, and the foregoing was approved. In this case plaintiff's predecessor in title, by deed date December 1st, 1772,

conveyed a strip of ground eight feet wide and two hundred and thirty feet long, adjoining the wall of the prison in Reading, Pa., to the commissioners of Berks County and their successors, "To and for the use, intent, and purposes following; that is to say, to be and remain forever hereafter unbuilt on in order to prevent any prisoner or prisoners making their escape over the said prison wall by reason or means of any building to be erected contiguous to the same wall." In 1849 the prison was removed and the prison property sold. Plaintiff filed a bill to quiet the title of the eight feet adjoining the old prison wall on the ground that the fee conveyed to the commissioners was a base fee determinable upon cessation of the use of the property for that purpose, and a decree to that effect was entered. Endlich, J., whose opinion was adopted by the Supreme Court, says (148 Pa. St., 244): "The instrument under consideration is, therefore, to be treated precisely as if it contained a declaration that the grant was for the purpose mentioned and no other. But where an estate is conveyed in fee for a specified purpose '*and no other*,' the fee is a base fee determinable upon cessation of the use of the property for that purpose; Kirk *vs.* King, 3 Pa., 436; Scheetz *vs.* Fitzwater, 5 *Id.*, 126."

Hence when a grant is made for a particular purpose, and when to that purpose is superadded the words "and for no other purpose," or "for no other purpose whatsoever," the grantee's estate is conditional, and upon the cessation of the use the grantor may enter for condition broken.

Of course, the mere expression of a purpose will not of or by itself create a condition, particularly when that purpose is one disclosed by a separate instrument. Thus a grant in fee simple to county commissioners, "in trust and for the use of the inhabitants of Delaware County to accommodate the public service of Delaware County," was held not to create a base fee. In this case the conveyance was for a valuable consideration and a separate declaration of trust was executed by the trustees. The court, in its opinion, said: "Had the

ancestor of the plaintiffs conveyed the property as a gratuity to be used in a particular way they might have had a plausible case on the cessation of the user."

Kerlin *vs.* Campbell, 15 Pa. St., 500.

So also a grant to the county commissioners of Union County, Pennsylvania, and their successors in office, of a tract of land with a brick court-house then erected upon it, "in trust for the use of the county in fee simple," was held to create a fee simple.

Seebold *vs.* Shitler, 34 Pa. St., 133.

Similarly a devise of land to a religious body in fee, "there to build a meeting-house upon," &c., was held to pass a fee.

Griffitts *vs.* Cope, 17 Pa St., 96.

Judge Rogers here distinguishes between cases where the grant is in fee for a certain purpose without more, and those where it appears that the estate ends when the use is abandoned. So a grant to a congregation "for the benefit, use, and behoof of the poor of said * * * congregation * * * forever," and "for a place to erect a house of religious worship for the use and service of said congregation, and if occasion require a place to bury their dead" (Brandle *vs.* German Reformed Congregation, 33 Pa., 415), was held to pass a fee simple.

These cases obviously have no application to the present case.

It is unnecessary to add that decisions are not pertinent which relate to the construction of deeds upon mere recitals that the grant is upon a certain consideration, or where the covenants are collateral or in another instrument. As in—

Cook *vs.* Trimble, 9 Watts, 15;
Union Canal Co. *vs.* Young, 1 Watts, 410;
Perry *vs.* Scott, 51 Pa. St., 119;
Church *vs.* Pub. Ground Co., 103 Pa. St., 608.

This case differs also from the cases where a fee is vested in trustees without limitation, and then a purpose is suggested, either collaterally or in other than the granting clause of the deed, as in Barr *vs.* Weld, 24 Pa. St., 84, where a conveyance

was to trustees and to their successors forever in trust for the district formerly called Utica School District, without even a direction to erect a school upon it.

Nor is the present the case of a charitable use, or one for the application of the *cy pres* doctrine, where the court construes a primary charitable intention, as in—

Wright *vs.* Linn, 9 Pa. St., 433;
In re Mercer Home, 162 Pa. St., 232.

The doctrine herein contended for is not confined to Pennsylvania. It is a common rule of construction of general application. The Pennsylvania cases accord with the great weight of authority.

Thus, in *Stuyvesant* vs. *The Mayor of New York City, 11 Paige, Ct., 427*, land was granted to New York City "Upon the express condition that such lands shall at all times and forever thereafter be appropriated to and used for the purposes of a public square." Here the intention was clear that the purpose for which the land was granted was for a square only. *Held*, a condition, and that the grantor might file a bill to enforce the grant or enter for condition broken.

So, in *Close* vs. *Cedar Rapids R. R., 64 Iowa, 149*, a conveyance in consideration of one dollar and the permanent location of a depot on the grounds conveyed was held to be a condition subsequent, and the failure to keep the depot upon the ground worked a forfeiture.

So, in *Crane* vs. *Hyde Park, 133 Mass., 147*, land granted to be held by said district for the purpose of building a schoolhouse thereon and to be improved for the benefit of schools, *and for no other purpose*, was held to be a conditional estate.

So, also—

O'Brien *vs.* Wetherill, 14 Kan., 616;
Cowell *vs.* Springs Co., 3 Col., 82;
Collins Co. *vs.* Marcy, 25 Conn., 242;
Plumb *vs.* Tubbs, 44 N. Y., 442;
Cowell *vs.* Springs Co., 100 U. S., 55.

So, in Church *vs.* Grant, 1 Lead. Cases Am. Law, Real Property, page 173, Bigelow, J., says:—

"There is a further distinction in the nature of estates on condition. Where an estate in fee is created on condition, the entire interest does not pass out of the grantor by the same instrument or conveyance. All that remains after the gift or grant takes effect is reserved to the grantor and his heirs only, which gives them the right to enter as of their old estate upon the breach of the condition. This possibility of reverter, as it is termed, arises in the grantor or devisor immediately on the creation of the conditional estate."

And such possibility of reverter passes to the grantor's heirs;

Scheetz *vs.* Fitzpatrick, 5 Pa. St., 245.

II.

This rule of construction applies equally whether the conveyance is or is not to trustees.

The court below seemed to consider that because the conveyance was to trustees the ordinary rule of construction was altered. It is submitted that no such distinction exists. There is no reason for such distinction. The *grantor's* reserved estate is the same whether the conveyance is to A. for his own use, for a specified purpose and for no other, or for the use of some one else for a specified purpose and for no other. In both cases the legal estate is in A., and the legal reservation to the grantor is the same. The words creating the condition are the same in either case. Hence the construction is the same.

This is not a case of a conveyance for charitable uses where a court presumes a primary general charitable purpose and construes the means or language used to effect that end as being merely secondary. The court below ignored the fact that the question at issue was the *grantor's* estate. It determined the question on doctrines solely applicable between trustee and *cestui que trust* in cases where the trustee improperly diverts the subject-matter of the trust against the declared wishes of the *cestui que trust*.

Kirk *vs.* King, 3 Penna. St., 441, was the case of an equitable estate, for the conveyance, being to an unincorporated association, was void at law.

In *McKissick* vs. *Pickle, 16 Penna. St., 140*, a conveyance to certain persons, their heirs and assigns, *in trust* for the use of a school-house, provided that if at any time thereafter the premises should be converted to any other use the lot should revert to the grantor and his heirs.

Here an express trust created in fee was held qualified by the *habendum* into an estate upon condition.

So in the second appeal of the case of McKissick *vs.* Pickle, 21 Penna. Rep., 232, the Supreme Court held that if the jury found that the trustees had for seven years permitted the property to be used as a dwelling-house their conditional estate was determined and the grantor was entitled to recover for condition broken.

In Henderson *vs.* Hunter, 59 Pa., 335, the conveyance was to trustees for a specified purpose, and it was held that the trustees took merely a base fee, which terminated when the premises ceased to be used for the specified purpose.

Moreover, in the present case the trustees were in reality the county, and by Act of Assembly of 1834 the title was expressly vested in the county.

Act of 15th April, 1834, P. L., 538, sections 3 and 9;
1 Purdon (12th ed.), page 436, pl. 12–18.

The condition was broken after the trustees' title had ceased, and when there was no equitable estate. The object of the original appointment of trustees was because the county did not possess the corporate power of holding real estate in its own name. In early times counties had not full corporate powers, and in Pennsylvania, as in other States, all titles for the counties were taken by trustees; thus was title taken to Independence Square in Philadelphia and all court-houses and prisons in Pennsylvania. See Act 18th February, 1780, 1 Smith's Laws, 484.

In speaking of the title thus taken by trustees, Ch. J. Shaw, in

Atty. Gen. vs. *Federal St. Meeting*, *3 Gray* (*Mass.*), *1*, a case much like this, says: "Supposing, then, that most of the old societies of Boston were formed by association without any acts of incorporation, and there being no other body capable in law of taking and holding the fee and legal estate of the land to be used for a church edifice and its incidents, the natural expedient would present itself, when an agreement had been made by an unincorporated body of persons associated together to form a new religious society with the owner of the land for its purchase to take a deed to and for the use and benefit of the whole in the names of a few, who in their natural capacity could take and hold the legal estate in fee in trust for those who had thus associated to form such society, and who had raised the money for that purpose. In such case the trustees would hold nearly the same relation to the pew-holders, the contributors, and members of the society so associated as the corporation, whether of a territorial or poll parish, would hold to the members, the legal estate would be in the trustees, and the entire use and beneficial interest in the members of the society."

In that case the grant was to trustees, without words of inheritance, for the benefit of a congregation (according to the tenures of the Church of Scotland), to hold and enjoy the lands whereon the meeting-houses are erected forever, and for no other use, intent, or purpose whatsoever.

Held, First.—As the trustees needed a fee, that such was granted.

Second.—That the trust changed by the change of form of worship of the congregation.

Third.—That as between the trustees and the congregation, after an occupation of forty years, the title was in the congregation.

In *Brendle* vs. *Congregation*, *33 Pa. St.*, *415*, where a gift was to trustees "in trust for a place to erect a church and for a burial-ground," it was held to vest an executed legal estate in the congregation itself.

LOWRIE, Ch. J.: "The use of the medium of trustees was mere matter of form, and does not at all make this case a charitable use. Such trustees seldom, if ever, convey to successors, but title in their name is treated as title of the congregation, to be used by the congregation at their discretion, as the law allows."

It was to obviate doubt as to the *status* of the estate of the county in such grants that the provisions of the Act of 1834 were suggested by the revisers of the Civil Code of Pennsylvania, who in their third report, dated December 31st, 1832, page 5, stated: "Whether they constitute a corporation remains unsettled as a general question. * * * We think that it will be found advantageous to declare every county and township a body corporate for certain purposes." And to effect this the revisers suggested the Act of 1834 which was subsequently passed by the legislature, as suggested by the revisers, and is as follows:—

"The titles to all and singular the court-houses, jails, prisons, and workhouses, together with the lots of land thereunto belonging or appertaining, in the several counties in this State, as they now are, or heretofore have been, vested in any feoffees or trustees, or in the Commonwealth, or in the commissioners of the respective counties, or any bodies politic or corporate, for the several use of the said counties respectively, shall be, and they are hereby declared to be, vested in the respective counties for the use of the people thereof, and for no other use."

Act 15th April, 1834, section 9, P. L., 538; 1 Purdon's Digest (12th ed.), page 436, pl. 18.

In the present case the grant was as much to the county as it was possible to make it, and if the county had been capable of taking, and the grant had been to it, for the use of a courthouse and no other use, it would have been a condition. Can it be less if to a trustee in trust for such use?

But the question does not really arise. For the condition was violated and the land diverted to other uses by the county

itself while holding the legal title long after the trustee's title had been abolished and the equitable estate merged into the legal title.

Hence the learned judge ruled the case upon an immaterial point, for at the time of condition broken no trust existed.

Again, from another standpoint, the same result is reached.

It is a familiar and universal rule of construction that a trustee's title "is commensurate in duration with the purpose to be answered by it."

Kirk *vs.* King, 3 Penna. St., 441.

Or, as stated in Perry on Trusts:—

"The general rule is that whether words of inheritance in the trustee are or are not in the deed, the trustee will take an estate adequate to the execution of the trust, and no more and no less. Courts will abridge the estate where words of inheritance are used if the execution of the trust does not require a fee, and so they will enlarge the estate if no words of inheritance are used in a deed."

1 Perry on Trusts, section 320 (citing many cases).

So, again, in 1 Perry on Trusts, section 312, the same principle is thus stated:—

"The extent or quantity of the estate taken by the trustee is determined, not by the circumstance that words of inheritance in the trustee are or are not used in the deed or will, but by the intent of the parties. And the intent of the parties is determined by the scope and extent of the trust. Therefore the extent of the legal interest of a trustee in an estate given to him in trust is measured, not by words of inheritance or otherwise, but by the object and extent of the trust upon which the estate is given. On this principle two rules of construction have been adopted by courts: First, whenever a trust is created, a legal estate, sufficient for the purposes of the trust, shall, if possible, be implied in the trustee, whatever may be the limitation in the instrument, whether to him and his heirs or not;' and second, '*Although a legal estate may be limited*

to a trustee to the fullest extent as to him and his heirs, yet it shall not be carried farther than the complete execution of the trust necessarily requires.'"

1 Perry on Trusts, section 312 (citing many cases).

So in Henderson *vs.* Hunter, 59 Pa., 335, the conveyance was made to trustees and their successors in trust to build a church "for the members of the Methodist Church, so long as they use it and no longer, and then to return back to the original owner;" and it was held that the trustees' estate terminated when the house ceased to be used as a place of worship according to the discipline of the Church.

In the present case the purpose to be answered by the trust is the use of the land for the use of a court-house "for the public use and service of the said county, and to and for no other use, intent, or purpose whatever." That use has now definitely determined. For over thirty years the land has been abandoned for any such use. The court-house building thereon erected has been torn down, removed, and permanently erected in another place. The purpose to be answered by the trustees' estate has ceased. Hence the trustees' estate also ceases.

Therefore, whether we consider the case as one of the *quantum* of the estate of the trustees, or as one of the *quantum* of the grantor's reservation, the same conclusion results. In either case the heirs of the grantor are entitled to recover.

Moreover, the construction for which we contend has been hitherto concurred in by the defendants. In 1703 a conveyance, similar to the one now in controversy, was made by Richard and Thomas Penn. It was to trustees in trust for the county defendant for the purposes of a prison, "and for no other use whatever." (See Exhibit No. 11, Record, page 23.) The use of the lot for prison purposes was discontinued, and the county desired to acquire the fee simple, so that they could use the property for other purposes. Accordingly, in 1852,

the county defendant bought from Granville and Richard Penn (the then heirs at law of the Penns), for a valuable consideration, their reversionary interest in the property, by deed reciting that "The county of Northampton is desirous of becoming the owners of the said lot of ground, with the appurtenances, in fee simple, to be by them occupied and enjoyed for all and every purpose whatsoever they may deem proper, and at pleasure to sell and convey the same free from all and every restriction, estate, and incumbrance whatever." If, as the defendants now contend, they are entitled under a similar conveyance to use the property for any purpose they may deem proper, and if, as they contend, the plaintiff has no reserved estate under such conveyance, why did the defendants purchase such title in 1852 from the plaintiff's ancestor, and recite that otherwise the property could not be perverted to other uses. This was a construction directly by the parties themselves of a similar conveyance under identical facts.

Evidence of these facts was offered at the trial, but rejected by the learned judge, and exceptions duly taken. The rejection of this evidence is embraced in the fourth assignment of error.

It is submitted that the foregoing practically covers the entire case. Other matters were urged at the trial, but were ruled in favor of the plaintiff in error, and hence need not be referred to here. The attention of the court, however, is called to one other matter, viz.:—

The land in question was one of the Proprietary rights or Manors of the Penns, and their rights in such property were expressly preserved to them by section 8 of the Act vesting the title to the Province of Pennsylvania in the Penns, passed November 27th, 1779 (1 Smith's Laws, 479), wherein it is provided, "That all and every the private estates, lands, and hereditaments of any of the said proprietaries, whereof they are now possessed, or to which they are now entitled, in their private several right or capacity, by devise, purchase, or descent, and likewise all the lands called and

known by the name of the proprietaries, tenths, or manors, which were duly surveyed and returned into the land office on or before the fourth day of July, in the year of our Lord, 1776, * * * or any parts thereof which have been sold, be confirmed, ratified, and established forever, according to such estate or estates therein and under such limitations, uses, and trusts as in and by the several and respective reservations, grants, and conveyances thereof are directed and appointed."

The plaintiff offered evidence that the premises in question had been duly surveyed in 1736 and entered in the book of proprietary rights. This evidence was duly admitted by the court. (See Record, page 8; also Exhibits No. 7 and 8, Record, page 22, 22*a*.)

The plaintiff further offered cumulative evidence upon the point that the present property was part of the private estate of the Manors or Proprietaries confirmed to the Penns, and for this purpose offered other certificates from the book of proprietary rights, and certified plans embracing the lot in question, and also deeds from the Penns subsequent to the divesting act. (See Exhibits Nos. 9, 10, and 13, Record, pages 22*b*, 23, and 27.) These were rejected by the court, presumably as being merely cumulative.

It is submitted, however, that the plaintiff in error had the right to submit all his evidence upon this point, whether cumulative or otherwise. This embraces the third, fifth, and sixth assignments of error.

C. BERKELEY TAYLOR,
A. T. FREEDLEY,
WM. BROOKE RAWLE,
For Plaintiff in Error.

156-46

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No. 151, October Term, 1894.

Supreme Court of the United States.

156-46

William Stuart, Plaintiff in Error,

vs.

The City of Easton and County of Northampton, Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR

H. J. STEELE,
For Defendants in Error.

(14,622)

Supreme Court of the United States.

WILLIAM STUART, Plaintiff in Error (Plaintiff below), vs. THE CITY OF EASTON AND THE COUNTY OF NORTHAMPTON, Defendants in Error (Defendants below).	October Term, 1894. No. 151.

ARGUMENT FOR DEFENDANTS IN ERROR.

In the first two assignments of error, it is sought to convict the Court below of error in its construction of the deed for the property in controversy. The court below held that it did not create an estate upon condition, but simply a trust in which the plaintiffs had no interest.

The action is in ejectment and therefore the burden rests upon the plaintiff to clearly prove his title. He seeks to do this by offering in evidence deed marked Exhibit No. 4, (printed record, page 13) and relying upon the language of the habendum to create an estate upon condition. The habendum was as follows:

"To Have and to Hold the said hereinbefore described lot of ground with the appurtenances unto the said John Jones, Thomas Armstrong, James Martin, John Rinker and Henry Allshouse, their heirs and assigns forever. In trust nevertheless to and for the erecting thereon a court house for the public use and service of the said county, and to and for no other use, intent or purpose whatsoever, to be holden of us, our

heirs and successors, proprietaries of Pennsylvania, as of our manor of Fermor, in the County of Northampton aforesaid, in free and common socage by fealty only. etc." This deed was dated Sept. 28, 1764. The county of Northampton was created by Act of Assembly passed March 11, 1752 (printed record, p. 6), which authorized certain persons to purchase land in trust to erect a court house thereon, Sec. 6 of which was as follows, viz: "That it shall and may be lawful to and for Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong and James Martin, or any three of them, to purchase and take assurance to them and their heirs of a piece of land, situate in some convenient place in the said town, in trust, and for the use of the inhabitants of the said county, and thereon to erect and build a court house and prison sufficient to accommodate the public service of the said county and for the ease and convenience of the inhabitants." (See printed record, page 10) The warrant (see page 11) which preceded the deed in question and is referred to in the deed, contained the following recital: "Whereas in and by an Act of General Assembly of this province entitled An Act of erecting the northwest part of Bucks into a separate county, which in and by the said Act is called Northampton, and Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong and James Martin, or any three of them, were appointed trustees to purchase and take assurance to them and their heirs of a piece of land situate in some convenient place in the town of Easton, in the said county, and thereon to erect and build a court house and prison sufficient to accommodate the public service of the said county, and for the ease and convenience of the inhabitants, as in and by the said Act appears. And whereas, on application and request of the said trustees, and out of our record to encourage and promote the improvement of the said town and general good and convenience of the inhabitants of the said county, we have condescended and agreed to grant the said trustees a lot or piece of ground of eighty feet square to be laid out in the centre of the great square in the middle of the said town of Easton for a court house for the use and the accommodation of the inhabitants of the said town and county forever."

It will be observed that the deed to the trustees follows strictly the language of the Act of Assembly authorizing the trustees to make the purchase, and, so far as the trustees are concerned, it conveys to them a fee simple. It conveys the ground to the trustees by name "their heirs and assigns forever." The subsequent clause "In trust, nevertheless, to and for the erecting thereon a court house for the public use and service of the said county, and to and for no other use, intent or purpose whatsoever," was intended to apply only as between the trustees and the people of the county and not between the Penns and the people of the county. The Penns parted with their entire title, and the language quoted is not a qualification of the estate as granted, but simply limits the uses to which it might be applied in the hands of the trustees. It contains no language which imports that the grant shall be void in case the purpose for which the land is conveyed is not carried out. Nor does it reserve to the grantors and their heirs the right in that event to re-enter on the land and resume possession of it as of their former estate. Moreover the purpose declared is in its nature general and public, and not one inuring specially to the benefit of the grantor. It simply defines a duty of the trustees to the county, not to their grantors. As between the grantors and the trustees, it conveys a fee simple, and between the trustees and the people of the county it creates a trust.

"Where the intention is to dedicate property to charitable uses, there is a difference between a conveyance *on condition* and a conveyance in trust. In the first case the grantor and those claiming under him may enter for condition broken. But in the last they cannot, and the proper remedy for an abuse of the trust is an application to the chancery powers of the court for an appointment of new trustees, or the means of compelling those already appointed to execute the trust according to the intention of the donors."

Barr vs. Weld, 24 Pa. St. 86.

Dillon on Mun. Corp., § 653.

Where subsequent conditions are relied on to work a forfeiture, they must be created by express terms or clear implication, and are construed strictly.

1 Washb' on Real prop., 447.

The policy of the law is to render the alienation and transfer of land as free as possible, and conditions are not favored in law. Therefore, whenever words can be construed either as a condition, reservation or covenant, the tendency of the courts is to construe them as one of the latter, rather than as the former.

Paschall vs. Passmore, 15 Pa. St., 295.

Church vs. Ground Co., 103 Pa. St., 613.

We contend first that the deed was an absolute conveyance to the county.

In construing a deed the court places itself nearly as possible in the situation of the contracting parties; and their intent will be ascertained in the same manner as in the case of any other contract. If the intention is not then apparent from the deed, resort is to be had to the rules of construction which give greater effect to these things about which the law presumes the parties are least liable to make a mistake.

3 Washb' on Real Prop., 384.

In Seebold vs. Shitler, 34 Pa. St., 133, an Act of Assembly authorized the commissioners of Union county to purchase a site for a court house, and the habendum of the deed was: "Unto the said commissioners of Union county and to their successors in office, in trust for the use of the county of Union forever." *Held*, That on the removal of the seat of justice and the discontinuance of the original uses for which the lots were conveyed, they did not revert back to the heirs of the original grantor. See also Kerlin vs. Campbell, 15 Pa. St., 500.

In Methodist Church vs. Old Columbia Public Ground Co., 103 Pa. St., 608, a conveyance of a certain piece of land in fee in trust for the sole use of a company, thereafter to be

formed, for supplying a certain borough with water, was held not to constitute a base fee determinable on the cessation of the use of the premises for a reservoir, but that it passed a fee simple. Chief Justice Mercur there said: "Whatever words are relied on as creating a condition must not only be such as of themselves would create a condition, but must be so connected with the grant as to qualify or restrain it. Labarre vs. Carleton, 53 Me., 211. It was said by Mr. Chief Justice Bigelow, in Packard, et al vs. Ames, et al, 16 Gray, 327: 'We know of no authority by which a grant declared to be for a special purpose without other words can be held to be a condition. On the contrary, it has always been held that such a grant does not convey a conditional estate unless coupled with a clause for the payment of money, or the doing of some act by the grantee, on which the grant is clearly made to depend.' To make the estate conditional the words must clearly show such intent. Cook vs. Trimble, 9 Watts, 15. * * * *The authorities show that the recital of the consideration and a statement of the purpose for which the land is to be used are wholly insufficient to create a conditional estate.*"

In Wilkes-Barre vs. Wyoming Historical Society, 134 Pa. St., 616, it appeared that by Sec. 5, Act of April 5, 1870, P. L. 891, the borough of Wilkes-Barre was directed to convey to a historical society a lot fronting on a certain street "for the erection of a hall for the use of said society," was held to impose no condition upon the title directed to be conveyed. Mr. Justice Green there said: "As to the use of the lot expressed in the fifth section of the Act, it is only necessary to say that it is not restrictive of the grant, and that the title is not dependent upon a literal compliance with the use expressed. The Act simply says that the lot shall be conveyed to the defendant 'for the erection of a hall for the use of said Wyoming Historical and Geological Society.' No condition of any kind was imposed. The passage of the title was not made to depend upon the performance of any terms. No direction was given that a hall should be erected and no penalty of any kind was established, whether by way of reverter of the estate or in any other manner whatever, for the non-erection of the hall. In

these circumstances the authorities are uniform and very clear that no conditional estate is given, and the land can be held in fee simple without performance of the consideration or purpose expressed.'"

See also

Harris vs. Shaw, 13 Ill. 456.

Board vs. Patterson, 56 Ill., 111.

Rewson vs. School Dist., 7 Allen, (Mass.) 125.

Ayer vs. Emery, 14 Allen, (Mass.) 67.

The words "in trust nevertheless and upon condition always" to use the premises for public worship, in a deed of land to a religious society, do not necessarily create a condition, but may impart merely a trust.

Sohier vs. Church, 109 Mass., 1.

Episcopal Mission vs. Appleton, 117 Mass., 326.

There are, however, no words in the deed to create a condition—neither proviso, ita quod, sub conditione, nor any equivalent for these usual if not indispensable words.

Perry vs. Scott, 51 Pa. St., 124.

Paschall vs. Passmore, 15 Pa. St., 295.

The plaintiff in error contends that where a grant is made for a particular use with the words "for no other purpose whatsoever" superadded, an estate upon condition is created. But passing the question whether they are sufficient in themselves to create a condition, they are in no way connected with the grant so as to qualify or restrain it. Labarre vs. Carleton, 53 Me., 211. Here the conveyance was to the trustees, "their heirs and assigns forever," the usual words used to grant a fee. The words "for no other purpose whatsoever" are not used in connection with the grant, nor do they in any way qualify it, but they are simply used to declare the uses for which the trustees should hold the fee previously granted. It was not intended to prevent its use or alienation for general purposes, but simply to prevent the trustees from

using the land for individual purposes. It defines a duty of the trustees to the county, not to their grantors. Thus, in Griffits vs. Cope, 17 Pa. St., 96, a devise of land in fee, "there to build a meeting house upon, if the members of that meeting shall agree to build a meeting house there, *but not else.*' The land was conveyed and the meeting house erected and used for more than a century. A new meeting house was then erected on other ground and the old one disused under a vote of the meeting and sold, but the sale was never consummated. Held 1st. The devise was of a fee simple and not a qualified estate. 2d. That the trustees could sell and convey.

The court there said: "There is a very palpable distinction between a gift of land from motives of charity and a dedication of land to charitable uses; and there are most intrusive reasons giving a judicial bias in favor of satisfying the motive without establishing a perpetual dedication.

"Our law discourages the fettering of estates and putting them into mortmain, and therefore favors the construction which relieves from restraints upon alienation. And it seems unreasonable to suppose that a devisor ever means that his heirs shall get back the land in such cases, except when he says so; or that, amidst the rapidly changing opinions of society, he means that his opinions shall be imbibed by others just as he left them, and shall forever withstand the changes necessarily incident to the progress of society, or that he means that no change in the number, circumstances and habits of the people shall ever justify any sort of conversion of the gift.

"It would seem contrary to public policy to favor a construction that would give to a man who died a hundred or a thousand years ago the control of land that ought to be controlled by the present generation. Such an intention ought to be expressed, not implied. * * * * *

"These grants are as between the grantor and grantees fees simple, and as between the trustees and beneficiaries they are trusts."

See, also—

Brendle vs. Church, 33 Pa. St., 415.

The distinction between the cases relied upon by the plaintiff in error and the facts of the present case is apparent upon the surface. Thus, in Kirk vs. King, 3 Pa. St., 436, the operative words of the grant did not convey a fee, but the grant was expressly stated to be "for an English school house and no other purpose." And this case was overruled in Wright vs. Linn, 9 Pa. St., 433. In Sheetz vs. Fitzwater, 5 Pa. St., 126, a conveyance was made of a mill dam or pond of water and land for the use and service of a certain mill, "and for no other use whatsoever." In McKissick vs. Pickle, 16 Pa. St., 140, the deed contained an express clause of reversion to the grantor, his heirs and assigns in the event that the premises should be used for a different purpose than that mentioned. This is also true of Henderson vs. Hunter, 59 Pa. St., 335. All of these cases turned upon a precise limitation contained in the deed, accompanied the creation of the estate, qualified it and prescribed the bounds beyond which it should not exist. Here, however, as already stated, the deed conveys a fee simple to the trustees without any clause so connected with the grant as to qualify or restrain it. No restraint was imposed on an alienation of the land. No clause provided for a forfeiture or termination of the estate in case the land ceased to be used for court house purposes. No right of re-entry was reserved by the grantors except the non-payment of quit rent, and the mention of the one cause for re-entry is certainly an exclusion of all other causes. No technical word to create a condition was used. No other words were used equivalent thereto or proper to create a condition. The authorities cited show that the statement of the purpose for which the land is to be used is wholly insufficient to create a conditional estate. And this statement only had reference to the uses for which it was to be held by the trustees as between them and the people of the county.

As already stated, the language of the deed to the trustees followed strictly the language of the Act of Assembly creating

the county and which authorized the purchase. By the following Act the title to all such property is vested in the county: "The titles to all and singular, the court houses, jails, prisons and work houses, together with the lots of land thereunto belonging or appertaining, in the several counties in this state, as they now are or heretofore have been, vested in any feoffees or trustees, or in the commonwealth or in the commissioners of the respecti e counties, or any bodies politic or corporate, for the the several use of the said counties respectively, shall be, and they are hereby declared to be vested in the respective counties for the use of the people thereof, and for no other use."

Sec. 9, Act April 15, 1834, Purd. Dig., (12th Ed.) p. 436.

II.

The deed created a trust in the nature of a charitable use not liable to be defeated by non-user.

We contend, moreover, that the deed having established a trust, it was in the nature of a charitable use not liable to be defeated by *non-user*. The object of that conveyance was the erection of a court house for the public use and service of the people of the County of Northampton. Such a trust is included in the class of charities recognized by the law of Pennsylvania as entitled to especial protection, and not subject to be destroyed for *non-user*. This is the distinction between a conveyance on *condition* and a conveyance in *trust*. In Wright vs. Linn, 9 Pa. St., 438, it was stated that "every kind of legal public benefaction is included in the notion of a charity." See also Fire Ins. Patrol vs. Boyd, 120 Pa. St., 624; Vidal vs. Girard, 2 How., 192, where the principles of the statute 43 Eliz. ch. 4, relating to charitable uses were recognized as in force in Pennsylvania. In Att'y Gen'l vs. Hellis, 2 Sim. & S. 67, a bequest of funds for the improvement of a town was held to be a charitable bequest. Sir John Leach said: "It is not material that the particular public or general purpose is not expressed in the statute of Elizabeth, all other legal, public or general purposes being within the equity of the statute. Thus a gift to maintain a preaching

minister; *a gift to build a sessions house for a county*, etc., have all been held to be charitable uses within the equity of the statute of Elizabeth." In Coggeshall vs. Pelton, 7 Johns, Ch. 292, it was held that a legacy for erecting a town house for transacting town business was a charitable bequest. The cases of Wright vs. Linn, supra and In re. Mercer Home, 162 Pa. St., 232, cited by plaintiff in error for a contrary principle, do not sustain it. In the first named case, a conveyance of land to trustees to erect a school house was held to create a charity which was not divested by non user for more than seventeen years and a re-entry by the grantor. And in the latter case a devise for a home for disabled clergymen, without any remainder or reversion after the charitable use, was held to pass the fee, and that the heirs of the devisor had no interest, direct or remote, in the property. The deed here in controversy vested a fee in the trustees without limitation, simply naming the trustees, "their heirs and assigns forever" "in trust nevertheless for erecting thereon a court house, etc."

In this respect it is identical in principle with Barr vs. Weld, 24 Pa. St., 87, where Lewis, Judge, said: "In the case before us there is a conveyance to trustees "and their successors forever," "in trust for the Utica School House." There is no express condition or contract giving to the grantor or his heirs the right to enter for condition broken or for misuser. He had, therefore, no right to maintain an ejectment." If there is any misuse of trust property the county is only answerable to the commonwealth. Vidal vs. Girard, 2 How., 191.

In re Mercer Home, 162 Pa. St., 232.

The doctrine of *cy-pres* is in force in Pennsylvania.

Act May 26, 1876, Purd. Dig., 12th Ed., 302.

III.

Forfeiture of condition, if any, was waived, and right of action is barred by statute of limitations.

In the history of the case in the brief for plaintiff in error it is stated: "Between the years 1763 and 1766 a court

house was erected on the lot which was used by the county until 1862, when it was torn down and the place where it stood has since been used as an open square by the City of Easton." The latter part of this statement we deny. Since it has ceased to be used for court house purposes it has been enclosed by an iron fence, a fountain costing several thousand dollars erected thereon, and the same has been in the open, notorious, adverse, continuous and exclusive possession of the city. In plaintiff's exhibit No. 6 (printed record, page 22) appears the following admissions of fact: "That the Northampton county court house was erected upon said property between the years 1763 and 1766, and remained upon the lot from that time until 1862, in which year it was removed and no other buildings have been erected thereon since," and that a re-entry was made on behalf of the plaintiff on July 25, 1888. We have therefore an admission of record that for twenty-six years after the alleged breach of condition the plaintiff acquiesced in the same. The doctrine that a forfeiture may be waived by the party who has the right to avail himself of the breach of a condition and that he may do this by acts as well as by express agreement is a familiar one. Sharon Iron Co. vs. City of Erie, 41 Pa. St., 341. And in Wilson vs. Guthrie, 2 Grant 110, a much shorter period was held to be "equivalent to an abandonment of the right of forfeiture."

Admitting however, that the deed created a condition,

"From henceforth no person or persons whatsoever shall make entry into any manors, lands, tenements, or hereditaments after the expiration of twenty-one years next after his, her or their right or title to the same first descended or accrued; nor shall any person or persons whatsoever have or maintain any writ of right, or any other real or possessory writ or action, for any manor, lands, tenements or hereditaments, of the seisin or possession of him, her or themselves, his, her or their ancestors or predecessors, nor declare or allege any other seisin or possession of him, her or themselves, his, her or their ancestors or predecessors, than within twenty-one years next before such writ, action or suit so hereafter to be sued, commenced or brought."

Sec. 2 Act March 26, 1785.

Schuylkill, &c., vs. McCreary, 58 Pa. St., 304.

IV.

A court house having been erected and used on ground conveyed was a compliance with condition, if any.

The language of the deed in question, relied upon to create an estate upon condition, is as follows, viz: "In trust, nevertheless, to and for the erecting thereon a court house for the public use and service of said county, etc." Now, it is a fundamental principle that all conditions must be strictly construed. Sharon Iron Works vs. Erie, 41 Pa. St., 341. The following is the rule laid down by Shaw, C. J., in Rawson vs. School Dist., 7 Allen, 125: "Such a condition when relied upon to work a forfeit is to be construed by the court with great strictness, the demandant shall have his exact legal rights and no more." Admitting, therefore, that the deed did create an estate upon condition, it was complied with by "erecting thereon a court house." There is nothing in the condition that requires the court house to be rebuilt or maintained perpetually upon that particular spot. Such an intention ought to be clearly expressed, and not left to implication. It is admitted that a court house was erected and maintained thereon for a hundred years, but to make the condition perpetual there should be express words to that effect. Thus, in Mead vs. Ballard, 7 Wallace, 290, a condition that a certain institute should be permanently located upon the lands granted, before a certain date was held fulfilled, by the passage before the said date, by the governing body of the institute locating it in accordance with the terms of the deed, followed by building on the same land after the date fixed; and that although the institute was afterwards burned and was re-erected upon grounds other than those granted. Miller, J., in the course of the opinion of the court, said, adverting to the condition: "Did this mean that all the buildings which the institution might ever need were to be built within that time, or did it mean that the officers were to determine in good faith the place where the buildings for its use should be erected? It is clear to us that the latter was the

real meaning of the parties, and that when the trustees passed their resolution locating their building on the land, with the intention that it should be the permanent place of conducting the business of the corporation, they had permanently located the institute within the true construction of the contract. * * * We are of opinion that the testimony shows in any view that can be taken of it that the condition was fully complied with and performed, and with it passed all right of reversion in the grantor or his heirs" And in Grif fits vs. Cope, 17 Pa. St., 99, the court said, in construing a clause sought to be made a condition, "It would seem contrary to public policy to favor a construction that would give to a man who died a hundred or a thousand years ago the control of land that ought to be controlled by the present generation. Such an intention ought to be expressed, not implied."

It is scarcely necessary to occupy time and space in discussing the assignments of error to the offers of testimony made at the trial and rejected. No authorities are cited to sustain these offers, and it is submitted that none can be found even looking in that direction. They all relate to tracts of land other than the one now in controversy and therefore could have no possible bearing upon the present proceeding. These offers were properly rejected as collateral to the present inquiry.

The deed in question conformed strictly to the language of the Act of Assembly creating the county, which authorized the trustees to purchase land in fee for court house purposes, to be held by them in trust for the people of the county. It was executed and delivered by the Proprietaries of Pennsylvania, in colonial times when the country was sparsely settled and when they were pecuniarily interested in enhancing the value of their other lands by the progress and prosperity of the infant colony. After thus securing the benefits of their grant, and after the lapse of a century and a quarter of time, it does seem contrary to public policy to permit this remnant of royalty to control land that ought to be controlled by the present generation. And it is un-

reasonable to suppose that even the grantors themselves intended that their heirs should get back this land, for they have failed to say so in express language. Such an intention should be clearly expressed and not left to doubtful implication. Bearing in mind the rapid changes in the circumstances; habits, opinions and institutions of our people since this grant was made, the wisdom of that rule of law which discourages the fettering of estates becomes all the more apparent.

In conclusion we desire to call the attention of the court to the fact that the assignments of error filed in this cause have not been framed in accordance with the rules of court and therefore cannot be considered.

H. J. STEELE,
For Defendants in Error.

PLAINTIFF IN ERROR'S REPLY.

The plaintiff in error's brief was delivered to the defendants in error some two months since. In answer thereto the defendants in error have filed a brief wherein they seek to justify the charge of the court below on grounds not considered by that court, and hence not touched upon in the plaintiff in error's brief. A short reply is therefore submitted upon these new grounds so alleged.

I. and II. The defendants in error urge that a gift to build a court house is a gift for charitable uses—that no conditional estate can be created where the land is to be devoted to charitable purposes—and that as there is no express clause in the deed reserving a right of entry, the grantor cannot take advantage of breach of condition.

A court house can hardly be considered to be a charity; neither is a jail. Both are classed together in the Tax Acts, and are not exempted from taxation as being charities, but as being "public property used for public purposes."

But the question whether a court house is or is not a charity is wholly foreign to the present case. The question here presented is, does the grant create a conditional estate as between grantor and grantee? The construction of the words of the grant will be precisely the same whether the grantees hold for charitable uses or not. A grant of a conditional estate may be made to any one and for any lawful purpose, and it is immaterial whether the grantees take as trustees or in their own right; whether they take for a charity or for private ends; whether they take for public or for individual purposes. The question is, do the words of the grant create a conditional estate? If they do, it is immaterial for what purposes the grantees were to hold the property. The distinction is accurately drawn in Barr *vs.* Weld, 24 Pa. St., 86, where there were *no* words creating a condition.

Every case cited by the defendants in error is either one of dedication wherein the trust is sought to be enforced, or goes simply to the point, that a grant in trust for a specified purpose, *without more*, does not of itself raise a technical condition—that such form of grant does not so negative other uses as to raise a conditional fee—that the grant is construed as a covenant or as a mere recital of purposes, and particularly so in cases of charitable uses.

But on the other hand, as between the grantor and grantee, when to the purpose specified in the grant, there is expressly superadded the condition that the grant shall be for "no other use, intent, or purpose whatsoever," then technical words of condition are used, and a conditional estate is created by the grant. Such construction is a rule of property in Pennsylvania.

Kirk *vs.* King, 3 Pa. St., page 436;
Sheetz *vs.* Fitzwater, 5 Pa. St., page 126;
Methodist Church *vs.* Public Ground Co., 103 Pa. St., at page 613;
Slegle *vs.* Lauer, 148 Pa. St., at page 244.

The defendants in error cite no case, whether for charitable purpose or otherwise, wherein these words were used, in which a contrary doctrine is asserted. We may presume such cases do not exist.

Nor need a right of re entry for breach of a conditional estate be expressly reserved in the grant. It necessarily flows from the condition and it vests solely in the grantor and his heirs. Thus—

"The usual way of taking advantage of a condition is by entry or some equivalent act, and the *right of entry is part of the condition itself, and need not be expressly reserved.*"

Notes to Gray *vs.* Blanchard, Leading Cases Law Real Property, page 143;
Gray *vs.* Blanchard, 8 Pickering, 284;
Thomas *vs.* Record, 47 Maine, 500;
Osgood *vs.* Abbott, 58 Maine, 80;
4 Kent's Com., 123.

Especially is this true in Pennsylvania, where the statute *quia emptores*, prohibiting subinfeudation, is not in force, and hence where, by reason of the tenure existing between the grantor and grantee, express clauses of distress, &c., are unnecessary;

Ingersoll *vs.* Sergeant, 1 Wharton, page 337.

And in Pennsylvania conditional estates and rights of entry for breach thereof exist without the reservation of specific clauses of entry;

Kirk *vs.* King, 3 Pa., 436;
Sheetz *vs.* Fitzwater, 5 Pa., 126;
Church *vs.* Public Ground Co., 103 Pa.;
Courtney *vs.* Kellar, 4 Pennypacker, 38;
Slegle *vs.* Lauer, 148 Pa. State, 236.

The defendants in error in their brief state that Kirk *vs.* King, 3 Pa. St., 436, was overruled by Wright *vs.* Lind, 9 Pa. St., 433. This is an error. A reference to the decisions themselves proves the contrary, and, upon the point of construction of the words of grant, Kirk *vs.* King has always been recognized and quoted as sound law, even as late as 1892. See—

Methodist Church *vs.* Public Ground Co., 103 Pa. St., at page 613;
Slegle *vs.* Lauer, 148 Pa. St., at page 244.

III. The defendants in error argue that the action is barred by the Statute of Limitations. But—

1. The plaintiff's right in remainder did not vest until the death of the prior tenant, Thomas Gordon Penn. He died September 10th, 1869; see Pedigree, record, page 20*a*. [He was, morever, a lunatic duly so adjudged under inquisition proceedings. This does not appear of record, as these points now raised by defendant were not made in the court below.]

The re-entry was made July 25th, 1888, and the action commenced July 26th, 1888.

The Statute of Limitations does not run against a remainderman until the right of entry accrues.

2 Wood on Limitations, page 639, and note 6; page 640, note 1.

The reason of the delay was, that the plaintiff in error lived abroad and never heard of the action of the grantees until immediately prior to his entry and action.

2. At common law entry prior to action was essential to recover for breach of condition in conditional estates. Such entry is not barred by lapse of time, and the Statute of Limitations does not run until entry made, as then and not before the cause of action accrues. This has been altered by statute in some States, but not in Pennsylvania.

Watters *vs.* Bredin, 70 Pa. St., 235, where the Supreme Court reversed, because proof of re-entry was excluded in the court below.

"When a breach of condition occurs the grantor or his heirs acquire a right to enter. If they do not exercise it they acquire no title and that right of entry cannot be assigned or devised. Until after entry, therefore, they have no interest in the estate. * * * By the common law the grantor or heirs must enter for breach to acquire seisin;"

See article "Estates upon Conditions," 1 American Law Review, 267;

Tallman *vs.* Snow, 35 Maine, 342;
Buhhard *vs.* Hubbard, 97 Mass., 188;
Phelps *vs.* Cresson, 12 Iredell (N. C.), 194;
Bowen *vs.* Bowen, 18 Conn., 535;
Stearns *vs.* Harris, 8 Allen, 598.

"But when an estate is, strictly speaking, upon condition in deed * * * the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of condition and make either an entry or a claim in order to avoid the estate."

2 Blackstone's Com., 155;
Littleton, Sections 3–47;
Coke on Littleton, 244 *b*.

3. The Statute of Limitations does not run against the Proprietaries under the law of Pennsylvania, for under the charter

of Pennsylvania the Proprietaries were substituted for the king, and their Proprietary rights and estates were expressly preserved to them by the Divesting Act, and are equal to those of the Commonwealth.

Kirk *vs.* Smith, 9 Wheaton, 241;
Penn's Lessee *vs.* Kline, 4 Dallas, 402;
Hilton *vs.* Brown, 1 Washington Circuit Court Report, 204.

4. The right of entry existed until sufficient length of time had elapsed to presume a final abandonment of the use. It has been decided that seven years would be sufficient wherein to presume abandonment, but so far as we are aware no less date has been judicially so construed. The entry and action were brought within twenty years after the expiration of such seven years' presumption.

IV. The defendants in error argue that the court house having once been erected on the land, such erection is a sufficient compliance with the condition, and that they can now use the land for any other purpose they deem desirable.

This is distinctly negatived by the terms of the grant. It is to be for "no other use, intent, or purpose whatsoever." Under the defendants in error's construction they can sell the land, or rent it, or divert it to such purpose of pecuniary profit as they may deem desirable. Under their contention, the erection need be but for a year or a day—any temporary building used for a brief space of time for court house purposes would suffice to enable them to sell and make a pecuniary profit out of a gift limited to a specific use. This is opposed to the plain intent of the conveyance, and as matter of law the gift to erect and to use for no other purpose implies a condition to maintain. Thus in Kirk *vs.* King, 3 Pa. St., 436, where the conveyance was for an English school house and for no other purpose, the court said, page 441: "The grant itself was consequently on an implied condition or agreement that the school should be kept up."

So in Courtney *vs.* Keller, 4 Pennypacker, 38 (Supreme Court of Pennsylvania, November, 1884), a conveyance was made containing the following provision:—

"The above-described lot is for the use of a public school known as School No. 6, in Ohio Township, and it is further agreed by the above-named parties that in case the school law now in existence should be abolished and the public school cease to exist, then the above-recited lot shall revert back to the parties of the first part, their heirs and assigns." The school house was built upon the said lot; maintained there for fourteen years, and then a part of the building removed to a new lot, and the remainder fitted up as a dwelling house and rented, the money being used to support the school.

Upon ejectment brought by the heirs of the grantors, the Supreme Court held that the conveyance was upon condition and that the abandonment of the use of the property was a breach of the condition, and said:—

"The lot is for the use of a public school, known as No. 6, in Ohio Township, and as public schools are not ordinarily maintained by rents from property owned by them, but by public taxes, we may take it for granted that the design of the deed was not to enable the directors to obtain a revenue by building dwellings upon the lot and renting them to their janitor and others, but that the intention of the parties was fully interpreted and fulfilled when the school house was erected thereon; but clearly if there had been no use of the lot for such purposes the right could never have attached, and so from the character of the grant itself, *without reference to the condition, when there was an abandonment of the use the right ceased.* * * * The district wanted a place for a public school house, and Margaret Courtney was willing that her lot should be used for that purpose but for no other. * * * If they choose to withdraw the school and abandon the use to which they were limited their right fell, of course, *and they could not claim the premises for a purpose not found in their deed.*"

We notice that at the conclusion of the defendants in error's brief they state that the assignments in error filed are not

framed in accordance with the rules of this court. As this statement is so general, we can only presume that it was intended that our first assignment of error was not sufficiently specific under the rules of court. Our first assignment of error was:—

1. "The learned court below erred in instructing the jury to find a verdict for the defendant."

In cases of binding directions a similar assignment of error has been the practice in this State under similar rules, for the reason that such assignment does literally embrace the language of the trial judge within the meaning of the rules. But to obviate all doubt upon this point we have filed the following:—

AMENDED ASSIGNMENT OF ERROR.

1. The learned judge erred in instructing the jury as follows:—

"I therefore instruct you that such is the effect of the conveyance and the plaintiff is not entitled to maintain this action, and your verdict should therefore be for the defendant."

C. BERKELEY TAYLOR,
A. T. FREEDLEY,
WM. BROOKE RAWLE.